



# Forest Peoples Programme

1c Fosseway Business Centre, Stratford Road, Moreton-in-Marsh GL56 9NQ, UK  
tel: (44) 01608 652893 fax: (44) 01608 652878 email: info@fppwrn.gn.apc.org



## **Tebtebba Foundation**

Indigenous Peoples' International Centre  
for Policy Research and Education  
PO Box 1993  
2600 Baguio City, Philippines

# **EXTRACTING PROMISES:**

## **INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK**

**Synthesis Report  
May 2003**

**Emily Caruso,<sup>1</sup> Marcus Colchester,<sup>2</sup> Fergus MacKay,<sup>3</sup> Nick  
Hildyard<sup>4</sup> and Geoff Nettleton.<sup>5</sup>**

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The Forest Peoples Programme is registered as a non-profit NGO in the UK and Netherlands. The Programme was originally established by the World Rainforest Movement and works to secure the rights of forest peoples to control their lands and destinies.

*They promised us jobs. They took everything from us. They took our land. They took our forest. They took our water.*

Sama Bailie of South West Cameroon  
speaking of the Chad-Cameroon Oil Pipeline Project.

*Land is our life. Land is our physical life – food and substance. Land is our social life, it is marriage, it is status, it is security, it is politics. In fact, it is our only life. Tribesmen would rather die to protect their traditional land... When you take our land you cut away the heart of our existence... Big multinational foreign companies being from an alien culture would neither understand nor grasp the significance of this. For them land is a commodity to be bought or sold. They just treat it as an exploitable resource.... Why would a genuine funding organisation like the World Bank Group fund culprit industries and their government cronies to violate lesser indigenous communities' rights to exist?*

Augustine Hala presenting Papua New Guinea case study to workshop.

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## 1. Executive Summary:

Mining, oil and gas development poses one of the greatest of the many threats facing indigenous peoples and the lands, territories and the resources that they depend on. As the global economy expands, pressure on indigenous lands to yield up these resources is intensifying. Historically, the huge transnational corporations spearheading these enterprises have paid little attention to indigenous peoples' rights. Today these same companies talk about 'best practice' and extol the virtues of participation and self-regulation. What can an institution like the World Bank, which is meant to promote poverty alleviation and 'sustainable development, do to ensure that the rights of indigenous peoples are not compromised by oil, gas and mining development?

This independent study was compiled as a contribution to the World Bank's *Extractive Industries Review* (EIR). The EIR process has been criticised by many indigenous peoples and non-governmental organisations for being unduly controlled by the World Bank. It remains to be seen whether contributions, such as this one, are taken seriously by the review and, if so, whether the recommendations will be heeded by the World Bank itself. The study builds on an extensive literature review and legal analysis, seven specially commissioned case studies carried out by indigenous peoples of their experiences of the World Bank and extractive industries and a two-day workshop at which these various contributions were presented and discussed.

Indigenous peoples are now accepted to be a self-identified category of peoples in the Americas, Africa, Asia and the Pacific. International human rights law and associated jurisprudence recognises that indigenous peoples, like all other peoples, enjoy rights to self-determination and sovereignty over their natural resources. States also claim these rights and assert the right to control sub-surface resources and to develop them in the national interest. These competing rights are not easily reconciled. However, it is a norm of international law that the promotion of national development should not be carried out at the expense of human rights. Existing human rights laws recognise the rights of indigenous peoples to the ownership and control of their lands, territories and natural resources and to free, prior and informed consent over developments proposed on their lands. The forced relocation of indigenous peoples to make way for development is expressly prohibited. These assertions of the rights of indigenous peoples have become so general that they may be considered to have become part of customary international law: there is a general acceptance that indigenous peoples should control developments that may affect their fundamental rights, which include their rights to their lands, territories and natural resources.

World Bank policies, however, make little mention of human rights. The Bank's 'safeguard' policies on indigenous peoples and involuntary resettlement seek only to mitigate the impacts of destructive development schemes. They permit forced resettlement. However, in order to lessen the consequences for vulnerable social groups, specific plans are required during project preparation which, in the case of indigenous peoples, are meant to secure their lands and ensure participation in Bank-funded projects. The indigenous peoples policy was developed without the participation of indigenous peoples and have since been strongly criticised by them. Moreover, successive reviews show that these safeguard policies are routinely flouted in practice. The World Bank's own studies show that only more than one third of World Bank projects that impact indigenous peoples have not applied the safeguard policy in any way at all. Even in the projects that did apply the policy, 14% had the required 'Indigenous Peoples Development Plan' and then only on paper. Case studies presented to the workshop from India and the Cameroon revealing the shocking consequences of this negligence for the indigenous peoples themselves.

The World Bank is currently reviewing its policy on indigenous peoples. The revision has been repeatedly repudiated by indigenous peoples, both for the manner in which the associated consultations have been carried out, and for the fact that the revised draft policy fails to uphold their rights and is indeed weaker than the previous policy which it is designed to replace. In resisting indigenous demands for a policy which respects their rights, the World Bank claims that it is prohibited from addressing human rights by its Articles of Agreement and it argues that it cannot require its borrowers or clients to observe even those human rights agreements to which they are party. This argument, while legally questionable, is routinely deployed by Bank staff and can be said to be part of the culture of the Bank. In an era when discourse about 'rights-based development' has become routine, the World Bank Group appears out of date and out of touch.

World Bank Group interventions in the extractive industries sector have negatively impacted indigenous peoples in manifold ways. In pursuit of national development through trade liberalisation, structural adjustment and the promotion of foreign direct investment, the World Bank has routinely advised countries to rewrite national mining codes to facilitate large-scale mining by foreign companies. These revised mining codes have been pushed through without the participation of indigenous peoples and without taking into account the interests and rights of indigenous peoples. The case studies from Colombia and the Philippines show how the revised mining codes have intensified pressure on indigenous lands and weakened or overridden the legal protections previously enjoyed by indigenous peoples. In Colombia, mineral, oil and gas reserves are exploited by unaccountable companies, which enjoy legal impunity while regularly violating national laws and using severely repressive measures to overcome local resistance. In Ecuador, the World Bank has also promoted national minerals surveys, again without taking the rights of indigenous peoples into account or assessing the likely consequences of intensified minerals extraction.

The synthesis paper and case studies also document the way the World Bank Group, through its various arms – the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation and the Multilateral Investment Guarantee Agency – has directly supported mines, oil and gas ventures without adequate assessment of the social and environmental consequences and without taking heed of the lack of good governance and institutional or regulatory capacity in project areas or countries. In the case of the Chad-Cameroon Pipeline, the World Bank's Board voted to go ahead with the project even when the forest-dwelling Bagyeli and supporting NGOs had clearly demonstrated the risks and even though Board members admitted that the Bank's safeguard policy on indigenous peoples has not been properly applied. The IFC has even supported mining in war-torn countries like the Democratic Republic of the Congo by companies with bad track records: projects that have been condemned by the United Nations.

The impacts of Bank-facilitated mining ventures have been severe, not just in terms of the direct social and environmental impacts of the mines or wells themselves but also in terms of spills of poisonous chemicals such as cyanide and mercury, ruptured oil pipes, breached tailings dams and long term pollution through acid mine drainage. The case study from Papua New Guinea reveals World Bank support for the use of the highly controversial technique of submarine tailings disposal – 'out of sight is out of mind' – without consideration for the long term implications for marine ecosystems and the livelihoods that depend on them. World Bank employees, assessors and consultants, working with mining companies in the name of the IFC and the World Bank's Business Partners for Development have been party to, or have endorsed, processes that have engineered consent or have co-opted communities into un-transparent and manipulated decision-making. In some cases, as in Russia, the World Bank's involvement in

specific projects may have temporarily mitigated some of the worst impacts of oil extraction but overall the World Bank's involvement in the sector has intensified pressure on indigenous lands which remain unsecured.

The Cameroon case also illustrates how the application of the World Bank's Natural Habitats policy, which requires the funding of compensatory conservation measures to 'offset' habitat destruction, has negatively impacted indigenous peoples by excluding them from the national parks set up in their forests. They thus suffer a double jeopardy, losing rights in the area impacted by the Bank-funded oil pipeline and in the GEF-funded conservation zones.

The study reveals that underlying these problems lies a flawed process of decision-making within the World Bank in which the pressure to lend overwhelms other objectives and objections. By prioritising its direct clients and the interests of large-scale private sector enterprises, the Bank is overriding its commitment to sustainable development. Corruption is knowingly tolerated and governance failures routinely overlooked. Staff who question loans being made under these circumstances are penalised. Currently, in the name of 'efficiency', lower 'transaction costs' and 'country ownership', the Bank is systematically weakening its safeguard policies, in order to 'panel proof' them against complaints by civil society to the Inspection Panel.

**Given the weakness of its safeguards, its institutionalised opposition to invoking binding human rights standards and the way it routinely flouts its own procedures, the study concludes that the World Bank should not be involved in the Extractive Industries sector.**

Moreover, the study recommends that the World Bank should radically revise its social policies and its safeguard policy on indigenous peoples. It should adopt a rights-based approach to development, recognise indigenous peoples' rights to the ownership and control of their lands, territories and natural resources, proscribe the forced relocation of indigenous peoples, and uphold the principle that development projects should only go ahead in areas owned or used by indigenous peoples subject to their free, prior and informed consent. Such changes in approach should be applied to the whole World Bank Group, should be complemented with new, legally binding systems of accountability and should be accompanied by an acceptance that the promotion of development through the private sector requires, first of all, the promotion of good governance, real accountability, effective regulatory mechanisms and strong institutional capacity.

## 2. Introduction:

Mining, oil and gas exploitation are among the most serious threats to the territories and livelihoods of indigenous peoples. For peoples who have already been pushed to the margins by colonialism, nation-building and cultural discrimination, the pressures of the mining, oil and gas industries can be hard to resist. Denied secure rights and with many nation States claiming sovereign rights over the resources which lie under their territories, indigenous peoples face an unequal struggle when confronted by highly capitalised companies backed by voracious global markets.

In developing countries, pressure on indigenous territories from the oil, gas and mining sectors has increased dramatically in the past forty years. Export-led development models, structural adjustment programmes and massive growth in foreign direct investment, have all favoured the expansion of the oil, gas and mining sectors. The World Bank has been a world leader promoting development along this path.

Yet, the mining industry also has concerns about indigenous peoples. Dealing with communities with unclear property rights, poorly understood political processes, in areas where the national administration may have little influence and the rule of law is weak, makes investment risky. Neither are mining companies immune to public criticism nor devoid of ethics. Mining industries are thus also in search of ways of dealing with indigenous peoples, that can assure predictable and legally secure outcomes, and avoid conflict and costly litigation.

As a development agency, the World Bank has a responsibility to find means to reconcile the interests of these two players. Indeed for more than twenty years the World Bank has adopted policies designed to cushion 'tribal' and indigenous peoples from the worst impacts of the development process. It is also currently in the midst of an extended process of reviewing its indigenous peoples policy.

This study is part of a piece of independent 'focused research' that will contribute to the World Bank's 'Extractive Industries Review'. It is complemented by seven case studies elaborated by indigenous peoples themselves which set out their own experiences and views of extractive industries and the World Bank's involvement. Taken together this 'focused research' seeks answers to a number of key questions.

- What are the rights of indigenous peoples in relation to extractive industries?
- What is the World Bank's policy on indigenous peoples? Has it been effective in securing these rights and protecting indigenous peoples against the negative impacts of extractive industries? What are indigenous peoples demanding of a revised policy?
- What is the World Bank's record of support for the extractive industries? How have these investments performed in terms of indigenous peoples' rights, cultures and livelihoods?
- If there are deficiencies in the way standards are set and applied in World Bank projects and programmes, what are the underlying reasons for these institutional and practical shortcomings?
- What are industry and indigenous peoples proposing as 'best practices', which might form the basis for new industry and development agency standards in the future?

- Given the answers to the above, what can be concluded about the World Bank's involvement in the extractive industries sectors? What recommendations should the Extractive Industries Review make to the World Bank?

This synthesis report offers answers to these questions. It is designed as a benchmark contribution to the final report of the Eminent Person, Professor Emil Salim, who is leading the Extractive Industries Review, and who is to present his report to the World Bank in December 2003.

### **3. The Extractive Industries Review:**

Growing global consumption demands ever greater supplies of energy and raw materials, meaning increasing fossil fuel and mineral consumption and thus the need to explore and exploit the world's subterranean resources. Whilst previously untouched areas are prospected and opened to exploration, and forest frontiers are advancing ever further, financial globalisation and deregulation of trade create space for unfettered private investments and ventures. The increasing devastation caused by these forces has provoked a growing global voice campaigning against the unsustainable and destructive nature of such exploitation. In 2000, prompted by a Friends of the Earth campaign urging International Financial Institutions to phase out their investment in oil, mining and gas ventures, the World Bank responded by promising a 'World Commission on Mines' similar to the then ongoing World Commission on Dams (WCD). In the event, the World Bank's 'Extractive Industries Review' (EIR), which was launched by the World Bank in late 2001, turned out to be a very different kind of process to the WCD.

The World Commission on Dams, which was jointly established by the World Bank and World Conservation Union in 1997, was composed of a panel of commissioners – a set of independent experts drawn from the various 'stakeholder' groups with an interest in dam building: industry, government, engineering, environment, development NGOs, dam affected groups, indigenous peoples etc. They reviewed the experience with large dams, held extensive consultations, contracted independent researchers and organisations to carry out thematic reviews and then jointly authored a consensus-based report independent of the World Bank. The WCD recommendations address the entire large dams sector. Although not without its problems, the WCD has been viewed by many as a credible process which made sincere efforts to develop standards in line with the ideals of 'sustainable development'.<sup>1</sup>

By contrast, the Extractive Industry Review, is being chaired and authored by a single Eminent Person, is largely staffed by seconded World Bank employees and is limited to a review of World Bank engagement in the Oil, Gas and Mining sectors. The Eminent Person is to report his findings, based on a series of hearings, focused research and field visits, directly to the World Bank President, James Wolfensohn and the World Bank's Board of Directors, at the end of the 3 year review period. Four regional workshops, consisting of discussions and presentations made by the various interest groups will provide information and evidence, on which the Eminent Person will draw to develop his final report. Complementary evidence will be delivered by project visits and a continual input of documentation from civil society and academics, as well as two independent focused research papers.

This report is the preliminary result of one such piece of focused research, and comprises a study commissioned by the EIR from the TebTebba Foundation and the Forest Peoples

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<sup>1</sup> Navroz K Dubash, Mairi Dupar, Smitu Kothari and Tundu Lissu, 2001, *A Watershed in Global Governance? An independent assessment of the World Commission on Dams*, World Resources Institute, Lokayan and Lawyers' Environmental Action Team, Delhi.

Programme. The study assesses the past and present impacts of World Bank projects in the oil, gas and mining sectors on indigenous peoples worldwide [see Box 1 for details].

At its commencement, concerns surrounding the organisation and administration of the EIR process were raised by the civil society organisations that were tracking it.<sup>2</sup> Due to its financial link to the World Bank, concerns were raised over the independence, inclusiveness, transparency and comprehensiveness of the process, and the faith of civil society in a just and accurate outcome was limited. At the outset therefore, a number of changes were demanded:

- The revision of the Terms of Reference to ensure an open and inclusive enquiry and not a pre-judged outcome and which should provide real independence for the Eminent Person (EP).
- The EP was called upon to establish an advisory group drawn from the various interest groups to share the burden of the work and ensure greater representation and independence.
- The EP and advisory board should be supported by a team of writers and rapporteurs to capture all the testimony and ensure a fair report.
- EP and advisers should visit impacted communities.
- The EIR Secretariat should not be housed in the International Finance Corporation on the same floor as the WBG Mining Department nor staffed by World Bank employees.
- EP should control the full budget and not allow over half to be controlled by WBG
- Regional workshops should be open to all observers, delayed, provided with good preparatory documents in the right languages and allow time for testimonies to be presented. Sponsored participants should be self-selected.
- WBG staff should participate as observers not 'stakeholders' in regional workshops.
- The time frame of the review should be extended
- There should be time for EIR to take on board the results of the internal review of the sector being carried out by the WBG Operations Evaluation Department and Group.
- The operations of the Multilateral Investment Guarantee Agency should be included in the Extractive Industries Review purview
- The 'Management Recommendations', to be made by the WBG staff to the Bank's Executive Directors after receipt of the EP's report, should be made available to review participants in draft form for comments before being finalised.

Although some changes in the process were made in response to these demands, many NGOs and indigenous peoples' organisations (IPOs) feel that these have been tokenistic. In February 2003, the EIR secretariat posted an interim 'Compilation Report' on its website which prematurely set out the main findings of the review, including a conclusion that the World Bank should 'remain involved but change – because extractive industries can be a tool for reducing poverty, and the World Bank Group can be a leader in tackling these issues'.<sup>3</sup> This caused dismay among civil society groups, as it confirmed their suspicions that the review was not genuinely independent but was drawing conclusions even before important hearings on Indigenous Peoples and in the Asia-Pacific were held. In mid-March 2003, many NGOs and IPOs sent a further letter to the Eminent Person expressing their continued frustration with the process and its apparent lack of independence and calling again for a more inclusive and independent process. In April, a large number of NGOs and IPOs attending the Asia-Pacific regional consultation staged a walk-out to express their indignation with the process.

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<sup>2</sup> Marcus Colchester, 2002, The World Bank's Extractive Industries Review: a credible and independent review of World Bank engagement in the Mining, Oil and Gas Sectors? *Indigenous Perspectives* 5(1):96-105

<sup>3</sup> Extractive Industries Review Working Paper: Compilation of Consultation Inputs, February 4 2003.

However, this piece of 'focused research', while 40% financed by the EIR, is nevertheless substantially independent of World Bank influence. Nor has there been any suggestion of editorial control being exerted over this research document by the EIR.

*Box 1: Indigenous Peoples, Extractive Industries and the World Bank*

The aims of the process are to:

- assess the experience of indigenous peoples with World Bank-financed projects and policy interventions in the oil, gas and mining sectors
- promote a direct dialogue between World Bank operational staff, the extractive industries and indigenous peoples spokespersons
- develop concrete recommendations for the World Bank, specifically with regard to indigenous peoples, in respect of future engagement in the oil, gas and mining sector

The activities entailed are:

- gathering relevant indigenous experiences and recommendations through an email consultation
- sub-contracting indigenous peoples' organisations to write up 'case studies' outlining their experience with World Bank-financed activities in the sector. These case studies were selected from the following main regions: Latin America, Africa, South Asia, South East Asia, Pacific, and Russian Federation.
- carrying out a detailed literature review on the theme.
- drafting a synthesis paper, which would include the findings from the email consultation, the literature review and the case studies
- holding an international workshop at which the case studies and synthesis paper would be presented and discussed with the participation of other indigenous spokespersons, representatives of the extractive industries, the World Bank and the Eminent Person and other advisers to the EIR.
- present a final report, which will take into account the issues raised in the international workshop and which will include: the case study papers; the synthesis paper; the recommendations made by indigenous peoples to the EIR.

#### 4. Definitions of Indigenous Peoples:

In 1986, the United Nations' Working Group on Indigenous Populations adopted the following working definition to guide its work:

*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity; as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>4</sup>*

Since 1984 the Working Group, which has met annually, has heard presentations from thousands of indigenous spokespersons from all over the world. Many of these spokespersons are from countries in Asia and Africa that were either never colonised by European powers (such as China, Thailand and Japan) or from which colonial settlers mainly withdrew following decolonisation (such as India and Malaysia). Nevertheless the 'aboriginal' or 'tribal' peoples in these countries, whose territories have been administratively annexed by emerging independent nation states, experience discrimination and a denial of their rights. They thus equate their situation with that of other indigenous peoples in settler states and demand the same rights and consideration.<sup>5</sup>

Summing up the deliberations of years of work, the Chairperson of the UN's Working Group has concluded:

*In summary, the factors which modern international organisations and legal experts (including indigenous legal experts and members of the academic family) have considered relevant to understanding the concept of "indigenous" include:*

- a) priority in time with respect the occupation and use of a specific territory;*
- b) the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;*
- c) self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity;*
- d) and an experience of subjugation, exclusion or discrimination, whether or not these conditions persist.<sup>6</sup>*

The International Labour Organization's Convention No.169 applies to both indigenous and tribal peoples. It ascribes both the same rights without discrimination. Article 1(2) of ILO Convention No. 169 notes:

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<sup>4</sup> E/CN.4/Sub.2/1986/7.

<sup>5</sup> AITPN, 1999,.

<sup>6</sup> Irene Daes, 1996, Supplementary Report of the Special Rapporteur on the Protection of the Heritage of Indigenous Peoples, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty - eighth Session, E/CN.4.Sub.2/1996/22

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*Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.*

In its General Recommendation No. VII, the Committee on the Elimination of Racial Discrimination made the important statement that membership in a group “shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.”<sup>7</sup> Logically, if individual members of a group may self-identify, they may also collectively self-identify as a group, nation or people, indigenous or otherwise. The Committee confirms that this is the case:

**C. Concerns and recommendations:** 18. The Committee reiterates its previous concern regarding the delay in resolving the claims of the Inughuit with respect to the Thule Air Base. The Committee notes with serious concern claims of denials by Denmark of the identity and continued existence of the Inughuit as a separate ethnic or tribal entity, and recalls its general recommendation XXIII on indigenous peoples general recommendation VIII on the application of article 1 (self-identification) and general recommendation XXIV concerning article 1 (international standard).<sup>8</sup>

The principle of self-identification has been strongly endorsed by indigenous peoples themselves and has been adopted in Article 8 of the United Nations’ Draft Declaration on the Rights of Indigenous Peoples. The Draft Declaration is now being reviewed by another special working group of the UN’s Human Rights Commission, with the objective of it being adopted during this current ‘International Decade of Indigenous People’. Although disputes between governments about definitions have absorbed a disproportionate amount of time at this Working Group, many international lawyers agree with indigenous peoples that there is no need for an external definition of the term ‘indigenous peoples’. Indeed they note that this is hardly possible, especially as the component term ‘peoples’, which is fundamental to the constitution of the United Nations, is itself undefined.<sup>9</sup> The Commission on Human Rights Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People, for instance, states

As regards individual membership, indigenous communities usually apply their own criteria, and whereas some States do regulate individual membership, it has become increasingly accepted that the right to decide who is or is not an indigenous person belongs to the indigenous people alone. Nevertheless, it must be recognized that membership in indigenous communities implies not only rights and obligations of the individual vis-à-vis his or her group, but may also have legal implications with regard to the State. In the design and application of policies regarding indigenous peoples, States must respect the right of self-definition and self-identification of indigenous people.<sup>10</sup>

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<sup>7</sup> *General Recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4 of the Convention (1990).*

<sup>8</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination. Denmark 21/05/2002.*

<sup>9</sup> Andrew Gray, 1995, *The Indigenous Movement in Asia*. In: Barnes, R H, Gray, A and Kingsbury, B (Eds) *Indigenous Peoples of Asia*, The Association for Asian Studies Inc, Michigan 35-59. Patrick Thornberry, 1996, *Indigenous Peoples: A short note on concept and definition*. Statement to the UN Working Group on Indigenous Populations, ms; Benedict Kingsbury, 1995, *Indigenous Peoples as an International Legal Concept*. In: Barnes, R H, Gray, A and Kingsbury, B (Eds) *Indigenous Peoples of Asia*, The Association for Asian Studies Inc, Michigan:13-35; 1998 “Indigenous Peoples” in *International Law: a constructivist approach to the Asian controversy*, *American Journal of International Law*, 92(3):414-457.

<sup>10</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, at para. 100.

Meanwhile there has been growing acceptance that the term ‘indigenous peoples’ applies in Asia and Africa. The newly established United Nations Permanent Forum on Indigenous Issues, for example, includes representatives of indigenous peoples from Africa and Asia on its panel. The working group takes the view that there are indigenous peoples in Africa, based on the principle of self-identification, among others, as expressed in Convention 169.<sup>11</sup> Likewise, the African Commission on Human Rights has recently established a working group on indigenous peoples. The Asian Development Bank has adopted a policy on indigenous peoples and a number of Asian governments, such as the Philippines, Nepal and Cambodia have accepted that the term ‘indigenous peoples’ applies to marginalized ethnic groups in their countries. This report thus accepts that the term ‘indigenous peoples’ has widespread applicability in all the major developing and transition countries in which the World Bank operates and the term has been used in this inclusive sense throughout this report.

### **5. Indigenous Peoples’ Rights and Resource Exploitation:**

Threats to indigenous peoples’ rights and well-being are particularly acute in relation to resource development projects, be they state- or corporate-directed. These projects and operations have had and continue to have a devastating impact on indigenous peoples, undermining their ability to sustain themselves physically and culturally. It is therefore no coincidence that the majority of complaints submitted by indigenous peoples to intergovernmental human rights bodies involve rights violations in connection with resource development.

Over the past 50 years, the World Bank has been involved in financing resource development and associated infrastructure projects affecting indigenous peoples. Indeed, the Bank’s first policy on indigenous peoples - *Operational Manual Statement 2.34 Tribal People in Bank-Financed Projects* – was adopted in response to “internal and external condemnation of the disastrous experiences of indigenous groups in Bank-financed projects in the Amazon region.”<sup>12</sup> Moreover, these violations are not confined to the past; as the UN Special Rapporteur comments:

...resources are being extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for the indigenous communities that occupy the land. Whereas the World Bank has developed operational directives concerning its own activities in relation to these issues ... and some national legislation specifically protects the interests of indigenous communities in this respect, in numerous instances the rights and needs of indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades.<sup>13</sup>

On this subject, the UN Special Rapporteur on indigenous land rights observes that

The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every sector of the globe, indigenous peoples are being impeded in every conceivable way from proceeding with their own forms of development, consistent with their own values, perspectives and interests.

<sup>11</sup> *Conceptual Framework Paper (2<sup>nd</sup> draft) by the Working Group on the Rights of Indigenous Peoples/Communities in Africa of the African Commission on Human and Peoples’ Rights*, 20 December 2002, 6-7.

<sup>12</sup> B. Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*. In, G.S. Goodwin-Gill & S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* Oxford: Clarendon Press (1999), at 324.

<sup>13</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, at para. 56.

Much large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights to lands, territories and resources. Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development.<sup>14</sup>

International human rights law places clear and substantial obligations on states in connection with resource exploitation on indigenous lands and territories: the UN Human Rights Committee has stated that a state's freedom to encourage economic development is limited by the obligations it has assumed under international human rights law;<sup>15</sup> the Inter-American Commission on Human Rights has observed that state policy and practice concerning resource exploitation cannot take place in a vacuum that ignores its human rights obligations,<sup>16</sup> as have the African Commission on Human and Peoples' Rights<sup>17</sup> and other intergovernmental human rights bodies.<sup>18</sup> In other words, states may not justify violations of indigenous peoples' rights in the name of national development. The basic principle, reaffirmed at the 1993 Vienna World Conference on Human Rights is that, "[w]hile development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."<sup>19</sup>

While the obligations incumbent on states have traditionally been the focus of international human rights law, there is strong evidence in contemporary law that obligations to respect human rights can apply to non-state actors including multinational corporations.<sup>20</sup> This issue aside, states have affirmative obligations to take appropriate measures to prevent and to exercise due diligence in response to human rights violations committed by private persons, including corporate entities.<sup>21</sup> Additionally, international financial institutions, such as the World Bank,

<sup>14</sup> *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur.* UN Doc. E/CN.4/Sub.2/2001/21, at paras. 49-50.

<sup>15</sup> *I. Lansman et al. vs. Finland (Communication No. 511/1992)*, CCPR/C/52/D/511/1992, 10.

<sup>16</sup> *Report on the Situation of Human Rights in Ecuador.* OEA/Ser.L/V/II.96, Doc. 10 rev. 1 1997, 89.

<sup>17</sup> *Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, at para. 58 and 69 (hereafter "Ogoni Case") – "The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities."

<sup>18</sup> Among others, see, UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.; and, UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions (1997). In, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*. UN Doc. HRI/GEN/1/Rev.5, 26 April 2001, pps. 49-54, at para. 18 (hereafter 'General Comments/Recommendations Compilation').

<sup>19</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12 July 1993.

<sup>20</sup> Among others, see, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. 1) (1992); *Copenhagen Declaration and Programme of Action*, UN Doc. UN Doc. A/CONF. 166/9 (1995); G.A. Res. 42/115, 11 February 1988, The Impact of Property on the Enjoyment of Human Rights and Fundamental Freedoms; Commission on Human Rights Resolutions 1987/18 and 1988/19; *Principles relating to the human rights conduct of companies. Working paper prepared by Mr. David Weissbrodt.* E/CN.4/Sub.2/2000/WG.2/WP.1, 25 May 2000; M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*. The Hague: Kluwer Law International (1999); J.R. Paul, Holding Multinational Corporations Responsible Under International Law 24 *Hastings Int'l. and Comp. Law Rev.* 285 (2001); Patrick Macklem, Indigenous Rights and Multinational Corporations at International Law, 24 *Hastings Int'l. and Comp. Law Rev.* 475 (2001); and, B. Frey, The Legal and Ethical Responsibilities of Transnational Corporations in the Protections of International Human Rights, 6 *Minn. J. Global Trade* 153 (1996)

<sup>21</sup> Inter-American Court on Human Rights, *Velasquez Rodriguez Case, Judgment of 29 July 1988*, Ser. C No. 4, para. 172 – "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead

are, as subjects of international law, unquestionably bound to respect customary international law norms and general principles of international law, including those pertaining to human rights.<sup>22</sup> The International Court of Justice specifically referred to such obligations in the *WHO Agreement Case*.<sup>23</sup>

International financial organizations are also bound to ensure that they neither undermine the ability of other subjects of international law, including their member states, to faithfully fulfill their international obligations nor facilitate or assist violation of those obligations.<sup>24</sup> The World Bank, as a specialized agency of the United Nations, also has obligations derived from the human rights provisions of the Charter of the United Nations and authoritative interpretations of the Charter, such as the Universal Declaration of Human Rights, the Covenants and other UN human rights instruments.<sup>25</sup>

The following sections describe the rights of indigenous peoples that limit and condition resource exploitation and the involvement of international financial institutions therein.

*Rights to Lands, Territories and Resources:*

For indigenous peoples, secure, effective collective property rights are fundamental to their economic and social development, to their physical and cultural integrity, to their livelihoods and sustenance. Secure land and resource rights are also essential for the maintenance of their worldviews and spirituality and, in short, to their very survival as viable territorial and distinct cultural communities.<sup>26</sup> These rights are almost always collective in nature and often involve rights and duties held of and owed to previous and future generations. According to the UN Rapporteur on indigenous land rights:

- (i) a profound relationship exists between indigenous peoples and their lands, territories and resources;
- (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities;
- (iii) the collective dimension of this relationship is significant;

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to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention;" - Inter-American Commission on Human Rights, *Case 7615 (Brazil)*. OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), 33; UN Human Rights Committee, Communication Nos. 161/1983, Annual Rep. Of the HRC 1988, 197 and 181/1984, Annual Rep. of the HRC 1990 (Vol. II), 37; Ogoni Case, at para. 58 and; European Court of Human Rights, *Sunday Times Case, Judgment of 26 April 1979*, E.C.H.R., Ser. A, (Vol. 30), 318.

<sup>22</sup> Among others, C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*. Cambridge: Cambridge University Press (1996), 240; H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity* (3<sup>rd</sup> Rev. Ed.) Martinus Nijhoff: The Hague (1995), 824 & 988; S. Skogly, *The Human Rights Obligations of the World Bank and IMF*. Cavendish: London, (2001), 84-87; P. Sands & P. Klein (eds.), *Bowett's Law of International Institutions* (5<sup>th</sup> Ed.), London: Sweet & Maxwell (2001), 458-59; and, F. Morgenstern, *Legal Problems of International Organizations*. Cambridge: Grotius Publications (1986), 32.

<sup>23</sup> Interpretation of the Agreement of 25<sup>th</sup> of March 1951 between WHO and Egypt. International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders* (1980), 89-90.

<sup>24</sup> Among others, D. Bradlow & C. Grossman, Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF. 17 *Human Rights Q.* 411, 428 and; F. MacKay, Universal Rights or a Universe Unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft operational Policy 4.10 on Indigenous Peoples, 17 *American University International Law Review* 527, 568-70.

<sup>25</sup> Among others, see, *Bowett's Law of International Institutions* supra note 11, 458-59 and; *Human rights as the primary objective of international trade, investment and finance policy and practice. Working paper submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1998/12*. UN Doc. E/CN.4/Sub.2/1999/11, para. 33.

<sup>26</sup> *Report of the Special Rapporteur, supra* note 2, paras. 39-40. See, also, *Indigenous people and their relationship to land, supra* note 3.

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and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.<sup>27</sup>

This multifaceted nature of indigenous peoples' relationship to land, as well as the relationship between development and territorial rights, was emphasized by United Nations High Commissioner for Human Rights, Mary Robinson, in her December 2001 Presidential Fellow's Lecture at the World Bank. She states that, for indigenous peoples

economic improvements cannot be envisaged without protection of land and resource rights. Rights over land need to include recognition of the spiritual relation indigenous peoples have with their ancestral territories. And the economic base that land provides needs to be accompanied by a recognition of indigenous peoples' own political and legal institutions, cultural traditions and social organizations. Land and culture, development, spiritual values and knowledge are as one. To fail to recognize one is to fail on all.<sup>28</sup>

In short, without secure and enforceable rights to lands, territories and resources indigenous peoples' means of subsistence are permanently threatened. Their lands and territories are their resource base and "food basket". Land and territory are also the source of, *inter alia*, medicines, construction materials and household and other tools and implements. Loss or degradation of land and resources results in deprivation of the basics required to sustain life and to maintain an adequate standard of living. The UN Special Rapporteur on indigenous land rights concurs stating that failure to guarantee indigenous peoples' property rights substantially undermines their socio-cultural integrity and economic security: "[I]ndigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources ..."<sup>29</sup>

In recognition of the preceding, international law requires that indigenous peoples' ownership and other rights to their lands, territories and resources traditionally owned or otherwise occupied and used be legally recognized, respected and guaranteed, which includes titling, demarcation and measures to ensure the integrity and sustainability of those lands and territories. These rights are protected in connection with a variety of other rights, including the general prohibition of racial discrimination, the right to equal protection of the law, the right to property, the right to cultural integrity and as part and parcel of the right to self-determination.

Indigenous peoples' rights to lands, territories and resources have been addressed a number of times by intergovernmental bodies under human rights instruments of general application. Concerning the territorial and economic aspects of self-determination, the UN Human Rights Committee (HRC), stated that

the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2)). ... The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.<sup>30</sup>

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<sup>27</sup> *Indigenous peoples and their relationship to land*, *id.*, at para. 20.

<sup>28</sup> *Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance*. Lecture by Mary Robinson, United Nations High Commissioner for Human Rights, World Bank, Washington D.C., Preston Auditorium, 3 December 2001.

<sup>29</sup> *Indigenous people and their relationship to land*, *supra* note 3, at para. 123.

<sup>30</sup> *Concluding observations of the Human Rights Committee: Canada*, 07/04/99, at para. 8. UN Doc. CCPR/C/79/Add.105. (Concluding Observations/Comments) (1999). *In accord*, see, also, *Concluding observations of the Human Rights Committee: Mexico*. UN Doc. CCPR/C/79/Add.109 (1999), para. 19; *Concluding observations of the Human Rights Committee: Norway*. UN Doc. CCPR/C/79/Add.112 (1999), paras. 10 and 17; and *Concluding*

Article 27<sup>31</sup> of the International Covenant on Civil and Political Rights (ICCPR),<sup>32</sup> protects linguistic, cultural and religious rights and, in the case of indigenous peoples, includes, among others, land and resource, subsistence and participation rights.<sup>33</sup> These rights are held by individuals, but exercised “in community with other members of the group,” thereby providing some measure of collectivity.

The HRC has interpreted article 27 to include the “rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.”<sup>34</sup> In reaching this conclusion, the HRC recognized that indigenous peoples’ subsistence and other traditional economic activities are an integral part of their culture, and interference with those activities can be detrimental to their cultural integrity and survival. The HRC further elaborated upon its interpretation of article 27 in 1994, stating that

With regard to the exercise of the cultural rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specifically in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>35</sup>

In July 2000, the HRC added that article 27 requires that “necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ...” and; “securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities ... must be protected under article 27....”<sup>36</sup>

Article 30 of the UN Convention on the Rights of the Child contains almost identical language to that found in ICCPR article 27, therefore, the points made above are also relevant to the rights

*observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments), para. 8.*

<sup>31</sup> Article 27 reads: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

<sup>32</sup> The ICCPR has been ratified by 149 States as of December 2002.

<sup>33</sup> Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990), 1. See also, Kitok vs. Sweden, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; Lovelace vs. Canada (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40) 166, UN Doc. A/36/40 (1981). *I. Lansman et al. vs. Finland* (Communication No. 511/1992), *supra* note 4; *J. Lansman et al. vs. Finland* (Communication No. 671/1995), UN Doc. CCPR/C/58/D/671/1995; and General Comment No. 23 (50) (art. 27), *adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5.* Although not decided under article 27, see, also, *Hopu v. France*. Communication No. 549/1993: France. 29/12/97. UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997.

<sup>34</sup> Among others, Ominayak vs. Canada, *Report of the Human Rights Committee*, *id.* See, also, A. Huff, Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada. 10 *Colorado J. Int'l. Enviro. Law and Policy* 161 (1999).

<sup>35</sup> *General Comment No. 23 (50) (art. 27)*, *supra* note 22, at 3.

<sup>36</sup> *Concluding observations of the Human Rights Committee: Australia*, *supra* note 19, at paras. 10 and 11.

of indigenous children under that instrument.<sup>37</sup> Article 30 and ICCPR article 27 embody one manifestation of the general norm of international law relating to the right to cultural integrity.<sup>38</sup>

The Committee on Economic, Social and Cultural Rights has highlighted state obligations to recognize and respect indigenous peoples' land and resource rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>39</sup> In 1998, the Committee stated that

The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP, and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party.<sup>40</sup>

It then recommended that the state party "take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture."<sup>41</sup> In the case of Panama, the Committee expressed its concern "that the issue of land rights of indigenous peoples has not been resolved in many cases and that their land rights are threatened by mining and cattle ranching activities which have been undertaken with the approval of the State party and have resulted in the displacement of indigenous peoples from their traditional ancestral and agricultural lands."<sup>42</sup>

Under the Convention on the Elimination of All Forms of Racial Discrimination (CERD) state parties are obligated to recognize, respect and guarantee the right "to own property alone as well as in association with others" and the right to inherit property, without discrimination.<sup>43</sup> These provisions of CERD are declaratory of customary international law.<sup>44</sup> In its 1997 *General Recommendation on Indigenous Peoples*, the UN Committee on the Elimination of Racial Discrimination contextualized these rights to indigenous peoples. In particular, the Committee called upon states-parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories."<sup>45</sup> While this General Recommendation is technically non-binding, it is nonetheless "a significant elaboration of norms" and corresponding state obligations under the Convention.<sup>46</sup>

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<sup>37</sup> The CRC has been ratified by 191 States as of December 2002.

<sup>38</sup> Human Rights Committee, General Comment No. 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* : 04/11/94 (1994), para. 8. See, also, S.J. Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 *Ariz. J. Int'l & Comp. L.* 1, 15 (1991) and, L.V. Prott, *Cultural Rights as Peoples Rights in International Law*. In, J. Crawford (ed.), *The Rights of Peoples*. Oxford: Clarendon Press (1988), 93.

<sup>39</sup> The ICESCR has been ratified by 146 states as of December 2002.

<sup>40</sup> *Concluding observations of the Committee on Economic, Social and Cultural Rights : Canada*. 10/12/98. E/C.12/1/Add.31, at para. 18.

<sup>41</sup> *Id.*, at para. 43.

<sup>42</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights : Panama*. 24/09/2001. UN Doc. E/C.12/1/Add.64, at para. 12.

<sup>43</sup> CERD has been ratified by 165 States as of December 2002.

<sup>44</sup> T. Meron, *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press (1989), 21.

<sup>45</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples*, *supra* note 7.

<sup>46</sup> P. Thornberry, *Indigenous Peoples and Human Rights*. Manchester: Manchester University Press (2002), at 217-18.

Similar conclusions about indigenous peoples' rights have been reached under Inter-American human rights instruments, specifically the American Convention on Human Rights (1969) and the American Declaration on the Rights and Duties of Man (1948). It is well established in the Inter-American system that indigenous peoples have been historically discriminated against and disadvantaged and therefore, that special measures and protections are required if they are to enjoy equal protection of the law and the full enjoyment of other human rights. These special measures include protections for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, "ancestral and communal lands," and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives.<sup>47</sup> The Inter-American Commission of Human Rights (IACHR) characterized the preceding as "human rights also essential to the right to life of peoples."<sup>48</sup>

According to the IACHR, indigenous peoples' property, including ownership, rights derive from their own laws and forms of land tenure, their traditional occupation and use, and exist as valid and enforceable rights absent formal recognition by the state.<sup>49</sup> It has related territorial rights on a number of occasions to cultural integrity, thereby recognizing the fundamental connection between indigenous land tenure and resource security and the right to practice, develop and transmit culture free from unwarranted interference. In 1997, for instance, the IACHR stated that

The situation of indigenous peoples in the Oriente [affected by petroleum exploitation] illustrates, on the one hand, the essential connection they maintain to their traditional territories, and on the other hand, the human rights violations which threaten when these lands are invaded and when the land itself is degraded. ... For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life, and to 'the geographical space necessary for the cultural and social reproduction of the group.'<sup>50</sup>

The IACHR reiterated this conclusion in its *Second Report on the Human Rights Situation in Peru*, stating that "[l]and, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation and registration of the lands represents essential rights for cultural survival and for maintaining the community's integrity."<sup>51</sup>

The Inter-American Court on Human Rights in the *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua* Case confirmed that indigenous peoples' territorial rights arise from traditional occupation and use and indigenous forms of tenure, not from grants, recognition or registration by the state. The latter simply confirm and guarantee pre-existing rights. In its judgment, issued in September 2001, the Court observed that

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<sup>47</sup> See, among others, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.26. (1984), at 76-78, 81; *Report on the Situation of Human Rights in Ecuador*, *supra* note 5, at 103-4; *Case 7615 (Brazil)*, OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), at 24, 31; and, *Third Report on the Situation of Human Rights in The Republic of Guatemala* OEA/Ser.L/V/II. 67, doc. 9 (1986), at 114.

<sup>48</sup> *Third Report on the Situation of Human Rights in The Republic of Guatemala*, *id.*

<sup>49</sup> Case 11.577 (Awas Tingni Indigenous Community - Nicaragua), *Annual report of the IACHR*. OEA/Ser.L/V/II.102, Doc.6 rev., (Vol. II), April 16, 1999, 1067, para. 108 and, See, also, art. XVIII, *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the IACHR in 1997.

<sup>50</sup> *Report on the Situation of Human Rights in Ecuador*, *supra* note 5, at 114-15.

<sup>51</sup> *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc 59 rev., (2000), at Ch. X, para. 16. See, also, *in accord*, *Third Report on the Human Rights Situation of Human Rights in Paraguay*. OEA/Ser.L/V/II.110 Doc.52 (2001), Ch. IX, para. 47

Among indigenous communities, there is a communal tradition as demonstrated by their communal form of collective ownership of their lands, in the sense that ownership is not centered in the individual but rather in the group and in the community. By virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.<sup>52</sup>

Finding that “[t]he customary law of indigenous peoples should especially be taken into account because of the effects that flow from it. As a product of custom, possession of land should suffice to entitle indigenous communities without title to their land to obtain official recognition and registration of their rights of ownership;”<sup>53</sup> the Court held, among others, that “the State must adopt measures of a legislative, administrative, and whatever other character necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities’ properties, in accordance with the customary law, values, usage, and customs of these communities.”<sup>54</sup>

Most recently, in the *Mary and Carrie Dann Case*, citing numerous international standards jurisprudence, the IACHR stated that “general international legal principles applicable in the context of indigenous human rights” include:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.
- This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.<sup>55</sup>

In this case, it interpreted the American Declaration on the Rights and Duties of Man to require “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources ....”<sup>56</sup>

International Labour Organisation Convention No 169 contains a number of provisions on indigenous territorial rights.<sup>57</sup> These provisions are framed by article 13(1) which requires that

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<sup>52</sup> Judgment of the Inter-American Court of Human Rights in the case of *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua* Issued 31 August 2001, *Inter-Am. Court on Human Rights, Series C, No. 79* (2001), at para. 149.

<sup>53</sup> *Id.*, at para. 151.

<sup>54</sup> *Id.*, at para. 164.

<sup>55</sup> Inter-American Commission of Human Rights, *Report N° 75/02*, Case N° 11.140, *Mary and Carrie Dann (United States)*, Dec. 27, 2002. OEA/Ser.L/V/II.116, Doc. 46, at para. 130. (footnotes omitted) (hereafter ‘*Mary and Carrie Dann Case*’).

<sup>56</sup> *Id.*, at para. 131.

<sup>57</sup> As of December 2002, the following 17 states have ratified ILO 169: Mexico, Norway, Costa Rica, Colombia, Denmark, Ecuador, Fiji, Guatemala, The Netherlands, Dominica, Peru, Bolivia, Honduras, Venezuela, Argentina

governments recognize and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories and especially “the collective aspects of this relationship.” Article 14 requires that indigenous peoples’ collective “rights of ownership and possession . . . over the lands which they traditionally occupy shall be recognized” and that states “shall take steps as necessary to identify” these lands and to “guarantee effective protection of rights of ownership and possession.” Article 13(2) defines the term ‘lands’ to include “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”

The preceding provisions on land rights must be read in connection with article 7(1), which provides that “[t]he people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.” This provision recognizes that indigenous peoples have the right to some measure of self-government with regard to their institutions and in determining the direction and scope of their economic, social and cultural development (the latter is limited by reference to other provisions of the Convention).

ILO 169’s predecessor, ILO 107 adopted in 1957, also provides that “[t]he right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized.” The ILO Committee of Experts has held that the rights that attach under article 11 also apply to lands presently occupied irrespective of immemorial possession or occupation. The ILO Committee stated that the fact that the people has some form of relationship with land presently occupied, even if only for a short time was sufficient to form an interest and, therefore, rights to that land and the attendant resources.<sup>58</sup>

The African Charter on Human and Peoples’ Rights is also relevant here. Property rights are guaranteed under article 14 and the right to equal protection of the law, both for individuals and peoples (articles 3 and 19), and the prohibition of discrimination (article 2) are also recognized. If UN and IACHR jurisprudence are relied upon, these provisions read together will amount to a recognition of indigenous property rights based upon traditional occupation and use.

Recent normative developments relating to indigenous lands, territories and resources are expansive, requiring legal recognition, restitution and compensation, protection of the total environment thereof, and various measures of participation in and consent to extra-territorial activities that may affect subsistence and resource rights and environmental and cultural integrity. Article 26 of the UN Draft Declaration, for instance, provides that

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal sea, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation or encroachment upon these rights.

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Brazil and Paraguay. The following states have submitted it to their national legislatures for ratification or are discussing ratification: Chile, The Philippines, Finland, El Salvador, Russian Federation, Panama, and Sri Lanka. Germany has adopted ILO 169 as the basis for its overseas development aid and the Asian Development Bank and the UNDP have incorporated some of its substance into their policies on Indigenous peoples. See, for instance, Asian Development Bank, *The Bank’s Policy on Indigenous Peoples*, April 1998.

<sup>58</sup> *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(4A), at 287, International Labour Conference, 75th Session, Geneva (1988).

The OAS Proposed Declaration also provides a substantial measure of protection (Art. XVIII):

1. Indigenous peoples have the right to the legal recognition of the various and specific forms of control, ownership and enjoyment of territories and property.
2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands and territories they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.
3. i) Subject to 3.ii.), where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.  
ii) Such titles may only be changed by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.  
iii) Nothing in 3.i.) shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.
4. The rights of indigenous peoples to existing natural resources on their lands must be especially protected. These rights include the right to the use, management and conservation of such resources.

The Convention on Biological Diversity (CBD), a binding international environmental treaty is also of relevance. Article 10(c) of the CBD provides that states shall “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.” Although the precise scope and meaning of this article have yet to be formally articulated, it certainly includes indigenous agriculture, agro-forestry, hunting, fishing, gathering and use of medicinal plants and other subsistence activities. This article, by implication, should also be read to include protection for the land base, ecosystem and environment in which those resources are found. These observations on article 10(c) are supported by the analysis of the Secretariat of the CBD in its background paper entitled “Traditional Knowledge and Biological Diversity”. In that paper, the Secretariat said the following about the language “protect and encourage” found in 10(c):

In order to protect and encourage, the necessary conditions may be in place, namely, security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures of indigenous and local communities, best evidenced by appropriate legislative protection (which includes protection of intellectual property, sacred places, and so on). Discussions on these issues in other United Nations forums have also dealt with the issue of respect for the right to self-determination, which is often interpreted to mean the exercise of self-government.<sup>59</sup>

#### *Sub-Surface Resources :*

The basis for state (public) ownership of natural, including subsoil, resources in international law is territorial sovereignty.<sup>60</sup> The basis for peoples’ rights to natural resources is the right of permanent sovereignty over natural resources and the concomitant right to freely dispose of natural wealth and resources. The latter was developed and elaborated upon by a series of UN General Assembly resolutions, the first adopted in the 1950s.<sup>61</sup> In the first instance, the right to permanent sovereignty over natural resources was (somewhat ambiguously) vested in ‘peoples

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<sup>59</sup> *Traditional Knowledge and Biological Diversity*, UNEP/CBD/TKBD/1/2, 18 October 1997.

<sup>60</sup> I. Brownlie, *Principles of Public International Law* (4<sup>th</sup> ed.). Oxford: OUP (1990) – “The rule universally accepted is that the subsoil belongs to the state which has sovereignty over the surface,” at 119.

<sup>61</sup> G.A. Res. 523(VI) and 626(VII), 12 January 1952 and 21 December 1952.

and nations' and was intimately related to decolonization and self-determination.<sup>62</sup> As colonial peoples became independent, the right, with some notable exceptions (see below), was increasingly expressed as a right of developing countries and then as a right of states.<sup>63</sup> It has subsequently been incorporated, as a right of states, into a number of multilateral treaties, for instance, the Convention on Biological Diversity.<sup>64</sup>

The content of the right of states is widely acknowledged to include the right to possess, use and dispose of natural resources, to determine freely and control prospecting, exploration and exploitation, to manage and conserve natural resources, to regulate foreign investors and to nationalize or expropriate property.<sup>65</sup> However, as with sovereignty in general, state sovereignty over natural resources is not absolute but is subject to other principles and rules of international law.<sup>66</sup> As a consequence, an increasing number of duties are associated with this right. In particular and among others, the duty to exercise permanent sovereignty in the interest of national development, ensuring that the entire population benefits, the duty to have due care for the environment, and the "duty to respect the rights and interests of indigenous peoples..."<sup>67</sup>

The two core international human rights instruments adopted by the UN in 1966 - the ICCPR and the ICESCR – both contain a major limitation on and exception to states' rights to natural resources. Common article 1 of the Covenants states, in pertinent part for our purposes, that:

- (1) All peoples have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue the economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources.... In no case may a people be deprived of its own means of subsistence.

Articles 47 of the ICCPR and 25 of the ICESCR describe the right set forth in sub-paragraph 2 - the human right of peoples, including indigenous peoples, to permanent sovereignty over natural resources<sup>68</sup> - as "the inherent right of peoples."<sup>69</sup> Its importance to indigenous peoples was eloquently stated by Ted Moses, Grand Chief of the Grand Council of the Crees:

<sup>62</sup> G.A. Res. 837 (IX) 14 December 1954, Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination; 1314 (XIII) 12 December 1958, Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination; 1720(XVI), 19 December 1961, Permanent Sovereignty over Natural Resources; and 1803 (XVII), 14 December 1962, Permanent Sovereignty over Natural Resources.

<sup>63</sup> Among others, see, G.A. Res. 3201 (S-VI), 1 May 1974, Declaration on the Establishment of a New International Economic Order and, G.A. Res. 3281 (XXIX), 12 December 1974, Charter of Economic Rights and Duties of States. The latter reads in article 1: "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."

<sup>64</sup> See, Convention on Biological Diversity, article 3, which reads: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies." See, also, Article 22(1) of the CBD, titled 'Relationship with Other International Conventions', which provides that: "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."

<sup>65</sup> N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*. Cambridge Studies in International Law. Cambridge: Cambridge University Press (1997), 391.

<sup>66</sup> *Principles of Public International Law*, supra note 49, 597 (referring to the right of self-determination as informing and complementing other principles of international law, such as state sovereignty.)

<sup>67</sup> *Sovereignty over Natural Resources*, supra note 54, at 391 and, at 9 – "Various injunctions have been formulated according to which States have to exercise their right to permanent sovereignty in the interest of their populations and to respect the rights of indigenous peoples to the natural wealth and resources in their regions, where 'peoples' are objects rather than subjects of international law."

<sup>68</sup> Among others, J. Crawford, *The Right of Self-Determination in International Law: Its Development and Future*. In, P. Alston (ed.), *Peoples' Rights*. Oxford: OUP (2001), pps. 7-68, 27 and; E-I. Daes, *The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflection on the Making of the United Nations Draft*

When I think of self-determination, I think also of hunting, fishing and trapping. I think of the land, of the water, the trees, and the animals. I think of the land we have lost. I think of all the land stolen from our people. I think of hunger and people destroying the land. I think of the dispossession of our peoples of their land. ... The end result is too often identical: we indigenous peoples are being denied our own means of subsistence. ... We cannot give up our right to our own means of subsistence or to the necessities of life itself. ... In particular, our right to self-determination contains the essentials of life – the resources of the earth and the freedom to continue to develop and interact as societies and peoples.<sup>70</sup>

A leading commentator on the right to self-determination states that “Article 1 common to the Covenants addresses itself directly to peoples” and “[p]eoples are thus the holders of international rights to which correspond obligations incumbent upon Contracting States ...”<sup>71</sup> These rights are not restricted to peoples in classic colonial situations only, but are vested in ‘all’ peoples.<sup>72</sup> Consistent with this, the UN Human Rights Committee (HRC), the body charged with monitoring state compliance with the ICCPR, has applied article 1 to indigenous peoples.<sup>73</sup> In its Concluding observations on Canada’s fourth periodic report, the HRC stated that

With reference to the conclusion by the [Royal Commission on Aboriginal Peoples] that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2)). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.<sup>74</sup>

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Declaration. In, P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination*. Turku: Institute for Human Rights, Abo Akademi University, (2000), pps. 67-84, 76-77.

<sup>69</sup> Article 47 of the ICCPR and Article 25 of the ICESCR, provide that “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources;”

<sup>70</sup> T. Moses, The Right to Self-Determination and its Significance to the Survival of Indigenous Peoples. In, *Operationalizing the Right of Indigenous Peoples to Self-Determination*. *supra* note 57, pps. 155-78, at 162-4.

<sup>71</sup> A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*. Cambridge: Cambridge University Press (1995), at 144.

<sup>72</sup> Among others, The Right of Self-Determination in International Law: Its Development and Future, *supra* note 57. Crawford states that

Just as a matter of ordinary treaty interpretation, one cannot interpret Article 1 as limited to the colonial case. Article 1 does not say that some peoples have the right to self-determination. Nor can the term ‘peoples’ be limited to colonial peoples. Article [1, paragraph] 3 deals expressly, and non-exclusively, with colonial territories. When a text says that ‘all peoples’ have a right – the term ‘peoples’ having a general connotation – and then in another paragraph of the same article, it says that the term ‘peoples’ includes peoples of colonial territories, it is perfectly clear that the term is being used in its general sense.

id., at 27. See, also, Human Rights Committee, General comment 12, *The right to self-determination of peoples (Art. 1): 13/04/84* (1984), at para. 6 - Article 1(3) “imposes specific obligations on States parties, not only in relation to their *own peoples* but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination” (emphasis added) – and, in accord, Committee on the Elimination of Racial Discrimination, *General Recommendation XXI on the right to self-determination* (1996), at para. 5 – “the rights of all peoples within a State.”

<sup>73</sup> For an extensive discussion on this issue by a member of the Human Rights Committee, see, M. Scheinin, The Right to Self-Determination under the Covenant on Civil and Political Rights. In, *Operationalizing the Right of Indigenous Peoples to Self-Determination*, *supra* note 57, pps. 179-202.

<sup>74</sup> *Concluding observations of the Human Rights Committee: Canada*, *supra* note 19.

The HRC reached similar conclusions – that the state implement and respect the right of indigenous peoples to self-determination, particularly in connection with their traditional lands and resources – in its Concluding observations on the reports of Mexico and Norway issued in 1999 and Australia in 2000.<sup>75</sup> In its complaints-based jurisprudence, the HRC has also related the right to self-determination to the right of indigenous peoples to enjoy their culture under Article 27 of the ICCPR.<sup>76</sup>

The Committee on Economic, Social and Cultural Rights has also referred to the rights of indigenous peoples in connection with article 1. In 2002, the Committee stated: “[t]aking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.”<sup>77</sup>

While most attention has focused on the rights of indigenous peoples as set forth in article 1(2), the first sub-paragraph is also highly relevant because resource exploitation directly affects indigenous peoples’ right “to freely determine their economic, social and cultural development.” Indeed, it is a mistake to disaggregate the various components of the right to self-determination as they are, in sum, a complex of inextricably related and interdependent rights. In this context, note article 1(2) of the 1986 UN Declaration on the Right to Development, which provides that “[t]he human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”<sup>78</sup>

The African Charter on Human and Peoples Rights (1981)<sup>79</sup> is another human rights treaty that contains a provision guaranteeing the right of peoples to freely dispose of their natural wealth and resources.<sup>80</sup> Whether this provision applied to the constituent peoples of a state or only to its entire population has been a bone of contention for many years.<sup>81</sup> However, in May 2002, the African Commission on Human and Peoples’ Rights unambiguously applied the right to the Ogoni people,<sup>82</sup> one of the constituent peoples of Nigeria:

Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil companies in

<sup>75</sup> *Supra* note 19.

<sup>76</sup> *Apirana Mahuika et al. vs. New Zealand* (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.2. See, also M. Scheinin, *supra* note 62.

<sup>77</sup> *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*. UN Doc. E/C.12/2002/11, 26 November 2002, at para. 7. The Committee added that: “The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects (see General Comment No. 2 (1990)), so that the enjoyment of the right to water is promoted.” *Id.*, at para. 60.

<sup>78</sup> G.A. Res. 41/128 of 4 December 1986, Declaration on the Right to Development.

<sup>79</sup> To date, 53 African states have ratified the Charter.

<sup>80</sup> Article 21 of the African Charter states in pertinent part that: “1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.”

<sup>81</sup> See, among others, R. N. Kiwanuka, The Meaning of “People” in the African Charter on Human and Peoples’ Rights, 82 *Am. J. Int’l L.* 80-101 (1988) and; P. Nobel, ‘The Concept of ‘Peoples’ in the African (Banjul) Charter on Human and Peoples’ Rights.’ In, P. Nobel (ed.), *Refugees and Development in Africa*, 9-18, Uppsala: Scandinavian Institute of African Studies (1987).

<sup>82</sup> The Ogoni self-identify as indigenous and have taken an active role in the UN Working Group on Indigenous Populations.

particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.<sup>83</sup>

The Commission noted in general that :

“At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.”<sup>84</sup>

Attempts by the United Nations to regulate the activities of multinational corporations with respect to human rights have also addressed this issue. The *Proposed Draft Human Rights Code of Conduct for Companies* for instance, provides, under the heading ‘Respect for National Sovereignty and the Right of Self-Determination’ that “[c]ompanies shall recognize and respect the national laws, regulations, administrative practices, and authority of the State to exercise control over its national resources in the countries in which the companies operate in so far as these laws, regulations, practices, and authority do not conflict with international human rights standards;” and, “[c]ompanies shall respect the rights of indigenous communities and minorities to own, develop, control, protect, and use their lands and cultural and intellectual property; indigenous communities and minorities may not be deprived of their own means of subsistence.”<sup>85</sup>

In addition to relying on textual expressions of the right to self-determination and the right to freely dispose of natural wealth in human rights instruments, discussed above, indigenous peoples’ rights to resources, including those of the subsoil, may also be said to derive from the general international law of self-determination and related law pertaining to permanent sovereignty over natural wealth and resources.<sup>86</sup> This is the case because the preceding rights remain vested in peoples notwithstanding international instruments that also vest permanent sovereignty in states.<sup>87</sup> The initial stage of an UN study on this issue concludes that “it is apparent that this basic principle of permanent sovereignty over natural resources applies as well to indigenous peoples for the following reasons, among others:

- (a) Indigenous peoples are colonized peoples in the economic, political and historical sense;
- (b) Indigenous peoples suffer from unfair and unequal economic arrangements typically suffered by other colonized peoples;
- (c) The principle of permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements;
- (d) Indigenous peoples have a right to development and actively to participate in the realization of this right; sovereignty over their natural resources is an essential prerequisite for this;

<sup>83</sup> Ogoni Case, at para. 58.

<sup>84</sup> *Id.*, at para. 45 (footnotes omitted).

<sup>85</sup> *Proposed Draft Human Rights Code of Conduct for Companies*. Working paper prepared by Mr. David Weissbrodt. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1, 25 May 2000, at paras. 14 and 18.

<sup>86</sup> *Indigenous peoples’ permanent sovereignty over natural resources*. Working paper by Erica-Irene Daes, former Chairperson of the Working Group on Indigenous Populations. UN Doc. E/CN.4/Sub.2/2002/23, at para. 6.

<sup>87</sup> See, among others, G.A. Res. 41/128 of 4 December 1986, Declaration on the Right to Development.

(e) The natural resources originally belonged to the indigenous peoples concerned and were not freely and fairly given up.<sup>88</sup>

This last point raises an important issue in connection with the rights of indigenous peoples in and to their lands, territories and resources traditionally owned or otherwise occupied and used discussed in the preceding section. These rights exist absent formal recognition by the state, are in large measure determined by indigenous peoples' laws, customs and usages, and unilateral extinguishment has been determined to violate, among others, the right to self-determination and the prohibition of racial discrimination.<sup>89</sup>

Note that in all the formulations used in the various international instruments and jurisprudence, the term 'resources' is used without explicit qualification or explanation. In the absence of evidence to the contrary – see, ILO 169, article 15(2), for instance, which provides for “cases in which the State retains the ownership of mineral or sub-surface resources” – ‘resources’ should presumptively be understood to include subsoil resources. This is especially the case in states where private ownership of minerals is recognized in domestic law: discrimination against indigenous peoples is not permitted where non-indigenous citizens can own minerals.

In common law jurisdictions - much of the British Commonwealth - in the absence of valid extinguishment or expropriation, surface rights include rights to base, subsoil minerals.<sup>90</sup> The same has also been held to be the case, again subject to valid extinguishment, for rights of indigenous peoples under native/aboriginal/Indian title jurisprudence in Australia, Canada and the United States.<sup>91</sup> In *Delgamuukw v. British Columbia*, for example, Lamer CJ of the Canadian Supreme Court stated that “aboriginal title also encompass [sic] mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way....”<sup>92</sup> Indigenous ownership of subsoil resources within reserves and reservations is also recognized in the United States and Canada. This recognition even extends to the so-called ‘royal minerals’, gold and silver, which is not the case for non-indigenous surface owners under common law.<sup>93</sup>

In conclusion, with respect to the nature of the rights held by indigenous peoples in general to natural resources, including those of the subsoil, a leading scholar concludes that, the “rights of indigenous peoples to the natural resources of their lands are at first glance similar to those of States (to be) derived from the principle of permanent sovereignty.... Yet, the essential difference is that indigenous peoples are still an object rather than a subject of international law; at best they can be identified as an emerging subject of international law.”<sup>94</sup> Without discussing the object versus subject issue, existing international human rights norms and jurisprudence

<sup>88</sup> *Id.*, at para. 7.

<sup>89</sup> Among others, see, *Concluding observations of the Human Rights Committee: Canada*, *supra* note 19 and; Committee on the Elimination of Racial Discrimination, *Decision (2) 54 on Australia*, 18 March 1999. UN Doc. A/54/18, para. 21.

<sup>90</sup> *Elwes v. Brigg Gas and Co.* (1886) 33 Ch D 568 – “Being ... in lawful possession, he was in possession of the ground, not merely the surface, but of everything that lay beneath the surface down to the centre of the earth ....” per Chitty J., at 568, and; *Rowbotham v. Wilson* (1860) HLC 348, at 360; 11 ER 463, at 468 – “There is no doubt that prima facie the owner of the surface is entitled to the surface itself and all below it *ex jure naturae* ....” per Lord Wensleydale.

<sup>91</sup> For US cases, see, among others, *United States v. Shoshone Tribe of Indians* 304 US 111 (1938); *United States v. Klamath and Moadoc Tribes* 304 US 119 (1938); and, *Otoe and Missouri Tribe v. United States* 131 F Supp 265 (1955). Canadian cases, see, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010; and *Guerin v R* (1985) 13 DLR 4<sup>th</sup> 321. Australian cases: among others, *Mabo v. Queensland No.2* (1992) 175 CLR 166 and; *Ward on behalf of the Miriuwung and Gajerrong People v. Western Australia* (1998) 159 ALR 483.

<sup>92</sup> *Delgamuukw*, at 1086.

<sup>93</sup> Among others, *United States v. Northern Paiute Nation* (1968) 393 F 2d 786.

<sup>94</sup> *Sovereignty over Natural Resources*, *supra* note 54, at 318

provide ample support for this conclusion.<sup>95</sup> Moreover, at least in the case of natural resources, classification as an object or subject of international law does not impede the rights of indigenous peoples under existing and emerging international human rights law nor does it diminish the duties of states and certain non-state actors to respect, protect and fulfill those rights.

*Free Prior and Informed Consent as an Accepted Principle:*

In contemporary international law, indigenous peoples' have the right to participate in decision making and to give or withhold their consent to activities affecting their lands, territories and resources or rights in general. Consent must be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation, free, prior and informed consent.

Observing that indigenous peoples have and continue to suffer from discrimination, and "in particular that they have lost their land and resources to colonists, commercial companies and State enterprises,"<sup>96</sup> the Committee on the Elimination of Racial Discrimination called upon states-parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."<sup>97</sup> The Committee later recognized indigenous peoples' right to "effective participation . . . in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the 'informed consent' of indigenous peoples" (emphasis added).<sup>98</sup>

The IACHR has found that Inter-American human rights law requires "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation."<sup>99</sup> In the same vein, the Commission emphasized that

Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole.<sup>100</sup>

Similarly, finding that Nicaragua had violated the right to property, judicial protection and due process of law by granting logging concessions on indigenous lands without taking steps to title and demarcate those lands, the IACHR held that

The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the [American] Convention, by granting a concession to the company SOLCARSA

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<sup>95</sup> See, for instance, Preamble paragraph 7, Proposed American Declaration on the Rights of Indigenous Peoples, supra note 38, - "Recognizing that indigenous peoples are a subject of international law . . ."

<sup>96</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples*, supra note 7, at para. 3.

<sup>97</sup> *Id.*, at para. 4(d).

<sup>98</sup> *Concluding Observations by the Committee on the Elimination of Racial Discrimination : Australia. 24/03/2000. CERD/C/56/Misc.42/rev.3*, at para. 9. See, also, among others, *Concluding observations of the Committee on the Elimination of Racial Discrimination : Costa Rica. 2003/2002 and, Concluding observations of the Committee on the Elimination of Racial Discrimination : United States of America. 14/08/2001.*

<sup>99</sup> *Mary and Carrie Dann Case*, at para. 131.

<sup>100</sup> *Id.*, at para. 140.

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to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.<sup>101</sup>

Additionally, the IACHR stated that “general international legal principles applicable in the context of indigenous human rights” include the right to

- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.<sup>102</sup>

In addition to prohibiting unilateral extinguishment of indigenous peoples’ land and resource rights, the property and user rights governed by this principle clearly include subsoil minerals.

Further, in 2001, the UN Committee on Economic, Social and Cultural Rights noted “with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem.”<sup>103</sup> It then recommended that the state “ensure the participation of indigenous peoples in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned . . . .”<sup>104</sup>

While not strictly requiring consent, ILO 169 requires that states “establish or maintain procedures through which [they] shall consult these peoples” to determine the extent to which indigenous peoples’ “interests would be prejudiced” prior to engaging in, or allowing resource exploitation (art. 15(2)). This provision should be read consistently with article 6(2)’s general requirement that consultation be undertaken “in good faith . . . in a form appropriate to the circumstances, with the objective of achieving agreement or consent.” Respect for indigenous peoples’ right to give their free and informed consent is still required if a state party has ratified one of the instruments noted above because, pursuant to article 35, application of ILO 169 “shall not adversely affect the rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties or national laws, awards, customs or agreements.”

Emerging standards also require free and informed consent. Article 30 of the UN draft Declaration, for instance, provides that :

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The approach adopted by the respective instruments above is consistent with the observations of the UN Centre for Transnational Corporations in a series of reports that examine the investments

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<sup>101</sup> Inter-American Commission of Human Rights, Report No. 27/98 (Nicaragua), at para. 142, *cited in*, The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of February 1, 2000, *Inter-Am. Ct. H.R. Ser. C, No. 66* (2000). See, also, Case 11.577 (Awes Tingni Indigenous Community - Nicaragua), *supra* note 38, para. 108.

<sup>102</sup> Mary and Carrie Dann Case, at para. 130. (footnotes omitted).

<sup>103</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia. 30/11/2001*. E/C.12/Add. 1/74, at para. 12

<sup>104</sup> *Id.*, at para. 33.

and activities of multinational corporations on indigenous territories.<sup>105</sup> The fourth and final report concluded that multinational companies' 'performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision making" and "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development...."<sup>106</sup>

A recent UN workshop on indigenous peoples and natural resources development reiterated and elaborated upon this conclusion, stating in its conclusions that the participants:

recognized the link between indigenous peoples' exercise of their right to self determination and rights over their lands and resources and their capacity to enter into equitable relationships with the private sector. It was noted that indigenous peoples with recognized land and resource rights and peoples with treaties, agreements or other constructive arrangements with States, were better able to enter into fruitful relations with private sector natural resource companies on the basis of free, prior, informed consent than peoples without such recognized rights.<sup>107</sup>

Finally, as discussed in detail in the next section, both general and treaty-based international law require indigenous peoples' free and informed consent in connection with relocation.

*Forced Relocation:*

Involuntary or forcible resettlement "is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities."<sup>108</sup> This is also recognized in a World Bank study on resettlement, which states that "[t]he potential for violating individual and group rights under domestic and international law makes compulsory resettlement unlike any other project activity. ... Carrying out resettlement in a manner that respects the rights of affected persons is not just an issue of compliance with the law, but also constitutes sound development practice."<sup>109</sup>

For indigenous peoples, forcible relocation can be disastrous, severing entirely their various relationships with their ancestral lands.<sup>110</sup> As observed by the UN Sub-Commission, "where population transfer is the primary cause for an indigenous people's land loss, it constitutes a

<sup>105</sup> The CTC reported to the Working Group four times: proposing methodology, and a draft questionnaire for distribution to Indigenous Peoples ( UN Doc. E/CN.4/Sub.2/AC.4/1990/6); a preliminary report (UN Doc. E/CN.4/Sub.2/1991/49); a report focusing on the Americas (UN Doc. E/CN.4/Sub.2/1992/54) and; a report focusing on Asia and Africa, summarizing the findings of all reports and making recommendations "to mitigate the adverse impacts of TNCs on indigenous peoples' lands, and increase indigenous peoples' participation in relevant government and TNC decision-making." (UN Doc. E/CN.4/Sub.2/1994/40).

<sup>106</sup> *Report of the Commission on Transnational Corporations to the Working Group on Indigenous Populations.* UN Doc. E/CN.4/Sub.2/1994/40, at para. 20.

<sup>107</sup> *Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy, Mining Companies and Human Rights.* Geneva, 5-7 December 2001. E/CN.4/Sub.2/AC.4/2002/3, 17 June 2002, at 3.

<sup>108</sup> Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur. UN Doc. E/CN.4/Sub.2/1993/8, at 10. See, also, Forced evictions: Analytical report compiled by the Secretary-General. UN Doc. E/CN.4/1994/20, for an enumeration of the various human rights implicated by resettlement; and, Report of the Representative of the Secretary-General on legal aspects relating to the protection against arbitrary displacement. UN Doc. E/CN.4/1998/53/Add.1

<sup>109</sup> *Resettlement and Development: The Bankwide Review of Projects Involving Involuntary Resettlement 1986-1993.* The World Bank, Environment Department: Washington DC. 1994, at 4.

<sup>110</sup> For an extensive overview of the impact on indigenous peoples of relocation caused by dams, see, Dams, Indigenous Peoples and Ethnic Minorities. *Indigenous Affairs*, Vol. 3-4, International Work Group on Indigenous Affairs and Forest Peoples Programme (1999), especially, M. Colchester, Introduction, 4-55.

principal factor in the process of ethnic cleansing;<sup>111</sup> and, “[f]or indigenous peoples, the loss of ancestral land is tantamount to the loss of cultural life, with all its implications.”<sup>112</sup>

Due to the importance attached to indigenous peoples’ cultural, spiritual and economic relationships to land and resources, international law treats relocation as a serious human rights concern. In international instruments, strict standards of scrutiny are employed and indigenous peoples’ free and informed consent must be obtained.<sup>113</sup> Relocation may only be considered as an exceptional measure in extreme and extraordinary cases. The implicit statement contained in these standards is that forcible relocation is prohibited as a “gross violation of human rights.”<sup>114</sup>

The report of the Representative of the UN Secretary General on this issue concluded that “an express prohibition of arbitrary displacement is contained in humanitarian law and in the law relating to indigenous peoples”<sup>115</sup> and, “[e]fforts should be made to obtain the free and informed consent of those to be displaced. Where these guarantees are absent, such measures would be arbitrary and therefore unlawful. Special protection should be afforded to indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”<sup>116</sup> Another UN report found that, with regard to relocation, the principle of consent has obtained the status of a binding general principle of international law.<sup>117</sup> Finally, the IACHR concluded that “[t]he preponderant doctrine” holds that the principle of consent is of general application to cases involving relocation.<sup>118</sup>

Again, given the fundamental physical, cultural, spiritual and other relationships that indigenous peoples have with their lands and resources, forcible resettlement amounts to a gross violation of a series of human rights. In the jurisprudence of the IACHR, forcible relocation amounts to a violation of human rights “essential to the right to life of peoples.”<sup>119</sup> It certainly constitutes a violation of article 27 of the ICCPR and article 30 of the Convention on the Rights of the Child in that, in most cases, it amounts to a *denial* of the right of indigenous persons and children, respectively, to enjoy their culture.<sup>120</sup> Addressing this issue, the HRC stated that

the Committee is concerned by hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities. *Relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant.* Therefore: When planning actions that affect members of indigenous

<sup>111</sup> *The human rights dimensions of population transfer, including the implantation of settlers. Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano.* UN Doc. E/CN.4/Sub.2/1993/17\*, at para. 101.

<sup>112</sup> *Id.*, at para. 336.

<sup>113</sup> Among others, ILO 107, art. 12, ILO 169, art. 16(2), draft UN Declaration, art. 10, Proposed American Declaration, art. XVIII(6), and Committee on the Elimination of Racial Discrimination, General Recommendation XXIII. See, also, *Progress report prepared by the Special Rapporteur on the human rights implications of population transfer, including the implantation of settlers.* UN Doc. E/CN.4/Sub.2/1994/18, at paras. 24-5.

<sup>114</sup> UN Commission on Human Rights resolution 1993/77 states that the practice of forced evictions constitutes a “gross violation of human rights” and urged governments to undertake immediate measures, at all levels, aimed at eliminating the practice.

<sup>115</sup> *Internally displaced persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39* UN Doc. E/CN.4/1998/53

<sup>116</sup> *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement.* UN Doc. E/CN.4/1998/53/Add.1, at Sec. IV, para. 4.

<sup>117</sup> *Progress report prepared by the Special Rapporteur on the human rights population transfer, including the implantation of settlers.* UN Doc. E/CN.4/Sub.2/1994/18, at para. 25.

<sup>118</sup> *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, supra* note 36, 120.

<sup>119</sup> *Third Report on the Situation of Human Rights in The Republic of Guatemala, supra* note 36, at 114..

<sup>120</sup> *Supra* note 22.

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communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them.<sup>121</sup> (emphasis added)

The Committee on Economic, Social and Cultural Rights frequently expresses concern about forcible relocation and has urged states to abandon the practice as incompatible with the obligations assumed under the Covenant.<sup>122</sup> In its *General Comment on the Right to Adequate Housing*, the Committee stated that it “considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”<sup>123</sup> As discussed above, in the context of indigenous peoples, the relevant principles of international law include the right to free and informed consent. Concern has also been expressed about forcible relocation in connection with mining on a number of occasions. In its Concluding observations on Bolivia in 2001, for instance, the Committee highlighted its concerns about “the incidence of forced evictions with respect to peasants and indigenous populations in favour of mining and lumber concessions ....”<sup>124</sup>

In General Comment No. 7, which exclusively addresses forced evictions, the Committee noted that indigenous peoples suffer disproportionately from the practice of forced eviction.<sup>125</sup> Observing that forcible relocation often occurs in relation to “large-scale development projects, such as dam-building and other major energy projects,”<sup>126</sup> the Committee further stated that it

is aware that various development projects financed by international agencies within the territories of State parties have resulted in forced evictions. In this regard, the Committee recalls its General Comment No. 2 (1990) which states, *inter alia*, that “international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account.”<sup>127</sup>

From the preceding, it is clear that, in the case of indigenous and tribal peoples, both general and conventional international law require that consent be obtained prior to resettlement. It is also clear that international law accords indigenous and tribal peoples, given their unique connection with their lands and resources, a higher standard of protection than applies to others. This higher standard in part entails a substantial, if not complete, limitation on the exercise of eminent domain powers by the state, at least to the extent that relocation is involved. For these reasons,

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<sup>121</sup> *Concluding observations of the Human Rights Committee : Chile. 30/03/99. CCPR/C/79/Add.104. (Concluding Observations/Comments) CCPR/C/79/Add.104, 30 March 1999, at para. 22.*

<sup>122</sup> General Comment No. 4, The Right to Adequate Housing (Art. 11(1) of the Covenant), adopted at the Committee's Sixth session, 1991. In, *Compilation of General Comments/Recommendations supra* note 7, pps. 22-27.

<sup>123</sup> *Id.*, at para. 18. See, also, General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions, *supra* note 7, at para. 1.

<sup>124</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights : Bolivia. 21/05/2001. UN Doc. E/C.12/1/Add.60, at para. 21. See, also, Concluding Observations of the Committee on Economic, Social and Cultural Rights : Panama. 24/09/2001, *supra* note 31, at para. 12.

<sup>125</sup> General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions, *supra* note 7, at para. 10.

<sup>126</sup> *Id.*, at para. 18.

<sup>127</sup> *Id.*, at para. 17.

the European Union, the Inter-American Development Bank and the World Commission on Dams also prohibit relocation without indigenous peoples' consent.<sup>128</sup>

*Indigenous Peoples' Rights in Customary International Law:*

Indigenous peoples' rights to lands and resources have crystallized into norms of customary international law binding on all states and most intergovernmental organizations. This is confirmed by no less than the Inter-American Commission on Human Rights. In the *Mary and Carrie Dann Case*, the IACHR stated that "general international legal principles"<sup>129</sup> applicable in the context of indigenous human rights" include:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.
- This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.<sup>130</sup>

This conclusion is supported by a number of scholars.<sup>131</sup> Professors Anaya and Williams, for instance, state that "the relevant practice of states and international institutions establishes that, as a matter of customary international law, states must recognize and protect indigenous peoples' rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns."<sup>132</sup> Professor Siegfried Wiessner concludes that state practice and *opinio*

<sup>128</sup> European Union: Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998) - "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas"; Inter-American Development Bank, *Operational Policy 710 on Involuntary Resettlement* (1998), Section IV, para. 4, and; World Commission on Dams: *Dams and Development: A New Framework for Decision-Making. The Report of the World Commission on Dams* London: Earthscan (2000) - "The scope of international law has widened and currently includes a body of conventional and customary norms concerning indigenous peoples, grounded on self-determination. In a context of increasing recognition of the self-determination of indigenous peoples, the principle of free, prior, and informed consent to development plans and projects affecting these groups has emerged as the standard to be applied in protecting and promoting their rights in the development process." *Id.*, at 112; see, also, 267, 271, 278.

<sup>129</sup> General principles of international law refer to "rules of customary law, to general principles of law as in Article 38(1)(c) [of the Statute of the International Court of Justice], or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies." *Principles of Public International Law*, *supra* note 49, at 19.

<sup>130</sup> *Mary and Carrie Dann Case*, at para. 130. (footnotes omitted).

<sup>131</sup> Among others, see, S.J. Anaya, *Indigenous Peoples in International Law* (Oxford and New York: OUP, 1996), at 49-58 and 107; S. Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Human Rights J.* 57 (1999), at 128; R. Torres, *The Rights of Indigenous Peoples: The Emerging International Norm*, 16 *Yale Journal Int'l Law* 127; and C. Iorns Magallanes, *International Human Rights and their Impact on Indigenous Peoples' Rights in Australia, Canada and New Zealand*, In, P. Havemann (ed.) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland: OUP, 1999), at 242 - "Further significant international legal developments provide evidence that customary international law has accepted the right of cultural self-determination for indigenous peoples and the consequent autonomous control necessary to achieve that ...."

<sup>132</sup> S.J. Anaya & R. Williams, *The Protection of Indigenous Peoples' Rights over Land and Natural Resources under the Inter-American Human Rights System*, 14 *Harv. Hum. Rts. J.* 33 (2001), at 55.

*juris* permit the “identification of specific rules of a customary international law of indigenous peoples.” These rules relate to the following areas:

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own systems of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.<sup>133</sup>

Additionally, Anaya persuasively asserts that much of ILO 169 reflects customary international law.<sup>134</sup> This assertion is supported by Lee Swebston, head of the Equality and Human Rights Branch of the ILO, who describes the influence of the Convention on state practice, including non-ratifying states, and intergovernmental organizations.<sup>135</sup>

Finally, indigenous land and resource rights are already protected under customary international law in connection with the principal provisions of CERD<sup>136</sup> and article 27 of ICCPR.<sup>137</sup>

#### *Environmental Rights :*

This section provides a brief overview of rights related to environmental protection.<sup>138</sup> As discussed above, the understanding that protection of indigenous peoples’ cultural integrity is closely linked to recognition of and respect for rights to lands, territory and resources and to protection and preservation of their physical environment is firmly entrenched in the normative structure of existing and emerging international human rights instruments. As one scholar states “there can be little room for doubt that there exists today a general consensus among states that the cultural identity of traditional indigenous peoples and local communities warrants affirmative protective measures by states, and that such measures be extended to all those elements of the natural environment whose preservation or protection is essential for the groups’ survival as culturally distinct peoples and communities.”<sup>139</sup>

A major United Nations study on the intersection of human rights and the environment reached the same conclusion. Determining that, given indigenous peoples’ unique relationship with their lands and territories, “all environmental degradation has a direct impact on the human rights of the indigenous peoples dependent on that environment,”<sup>140</sup> the Special Rapporteur proposed the following principle for inclusion in a Declaration of Principles on Human Rights and the Environment:

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<sup>133</sup> The Rights and Status of Indigenous Peoples, *supra* note 119, at 128

<sup>134</sup> S.J. Anaya, *Indigenous Peoples in International Law*, *supra* note 119.

<sup>135</sup> L. Swebston, The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years after Adoption. In, C. Price Cohen, *Human Rights of Indigenous Peoples*. New York: Transnational (1998), pps. 17- 36, 34-6.

<sup>136</sup> *Human Rights and Humanitarian Norms as Customary Law* *supra* note 33, 21.

<sup>137</sup> Human Rights Committee, General Comment No. 24, *supra* note 27, para. 8.

<sup>138</sup> See, among others, D. Shelton, Environmental Rights. In, P. Alston (ed.), *Peoples’ Rights*. Oxford: OUP, (2001), pps. 185-294 and; Kastrup, The Internationalization of Indigenous Rights from an Environmental and Human Rights Perspective, 32 *Tex. J. Int’l. Law* 97 (1997).

<sup>139</sup> G. Handl, Indigenous Peoples’ Subsistence Lifestyle as an Environmental Valuation Problem. In, M. Bowman and A. Boyle (eds.), *Environmental Damage in International and Comparative Law. Problems of Definition and Valuation*. Oxford: OUP (2002), 85-110, at 95 (footnotes omitted).

<sup>140</sup> *Human Rights and the Environment. Preliminary report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*. E/CN.4/Sub.2/1991/8 (1991), at para. 27.

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Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional ways of life. This includes the right to security in the enjoyment of their means of subsistence.

Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.<sup>141</sup>

The IACHR has also stated, and reaffirmed numerous times, that “indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources therein – respect for which is essential to their physical and cultural survival.”<sup>142</sup>

ILO 169, while not declaring a right to environment, is the first international instrument to exclusively relate environmental concerns to indigenous peoples. Article 4(1), for instance, requires states to take “special measures” to protect the environment of indigenous peoples. These special measures include environmental impact studies of proposed development activities (art. 7(3)), recognition and protection of subsistence rights (art. 23), safeguarding of natural resources (art. 15(1)), and measures to protect and preserve the territories of indigenous peoples (art. 7(4)). Article 7(1) contains one of the most important principles of the Convention, providing that “[t]he people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.” This article is one of the general principles of the Convention and provides a framework within which other articles are to be interpreted.

Indigenous peoples’ rights in relation to the environment have also been addressed under instruments of general application. In *Ominayak and the Lake Lubicon Bank v. Canada*, the HRC found that oil and gas exploitation and pollution generated thereby threatened the way of life and culture of the Band and therefore constituted a violation of article 27 of the ICCPR.<sup>143</sup>

In 1985, the IACHR examined the rights of the Yanomami people in the context of the construction of the Trans-Amazonia highway in Brazil, invasion of their territory by small-scale gold miners, environmental degradation and devastating illnesses brought in by the miners. The highway forced a number of Yanomami communities located near the construction path to abandon their communities and means of subsistence. The IACHR found, due to Brazil’s failure to take “timely measures” to protect the Yanomami, that violations of, *inter alia*, the right to life and the right to preservation of health and well-being under the American Declaration on the Rights and Duties of Man had occurred.<sup>144</sup>

The IACHR re-visited the Yanomami situation in its 1997 *Report on the Situation of Human Rights in Brazil*.<sup>145</sup> It concluded that although the Yanomami people have obtained recognition of their right to ownership of their land, “[t]heir integrity as a people and as individuals is constantly under attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures and invasions is irregular and feeble, so that they are constantly in danger and their environment is suffering constant deterioration.”<sup>146</sup> It recommended that Brazil “institute federal protection measures with regard to Indian lands threatened by invaders, with particular attention to those of the Yanomami ... including an

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<sup>141</sup> *Human Rights and the Environment. Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur.* E/CN.4/Sub.2/1994/9 (1994), Annex, at Principle 14.

<sup>142</sup> *Report on the Situation of Human Rights in Ecuador, supra* note 5, at 106.

<sup>143</sup> *Ominayak v. Canada, supra* note 22, 1

<sup>144</sup> *Case 7615 (Brazil)*, OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), 33.

<sup>145</sup> *Report on the Situation of Human Rights in Brazil.* OEAA/Ser.L/V/II.97 Doc 29 rev. 1 (1997).

<sup>146</sup> *Id.* at 112.

increase in controlling, prosecuting and imposing severe punishment on actual perpetrators and architects of such crimes, as well as state agents who are active or passive accomplices.”<sup>147</sup>

In its *Ecuador Report*, the IACHR again relates the right to life to environmental security stating that “[t]he realisation of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.”<sup>148</sup> With regard to implementation of state obligations concerning resource exploitation, the IACHR “considers that the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which could translate into violations of human rights protected by the American Convention.”<sup>149</sup>

Building upon principles adopted at the United Nations Conference on Environment and Development and various articles of the American Convention, the IACHR highlighted the right to participate in decisions affecting the environment.<sup>150</sup> An integral part of this right is access to information in an understandable form. Emphasizing procedural guarantees and state obligations to adopt positive measures to guarantee the right to life, the IACHR stated that, “[i]n the context of the situation under study, protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The quest to guarantee against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.”<sup>151</sup>

The African Commission also found that the right to life had been violated in connection with environmental pollution in the Ogoni case:

The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole.<sup>152</sup>

It also found a violation of article 24 of the African Charter, which guarantees the right of ‘peoples’ to a healthy environment. The Commission stated that article 24 “imposes clear obligations upon a government” and “requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”<sup>153</sup> Among the measures proposed to remedy violations, the Commission recommended “a comprehensive cleanup of lands and rivers damaged by oil operations.”<sup>154</sup>

#### *Economic, Social and Cultural Rights :*

A range of economic, social and cultural rights are implicated and may be adversely affected by resource exploitation. As is apparent from the preceding and as illustrated below, indigenous

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<sup>147</sup> *Id.*

<sup>148</sup> *Report on the Situation of Human Rights in Ecuador*, *supra* note 5, at 88.

<sup>149</sup> *Id.*, at 89.

<sup>150</sup> *Id.*, at 92-5.

<sup>151</sup> *Id.*, at 93.

<sup>152</sup> *Ogoni Case* at para. 67.

<sup>153</sup> *Id.*, at para. 52.

<sup>154</sup> *Id.*, at p. 13.

peoples' enjoyment of economic, social and cultural rights is fundamentally related to recognition of and respect for rights to own and control their lands, territory and resources traditionally owned or otherwise occupied and used. Also, while it is correct to say that economic, social and cultural rights are subject to progressive realization determined by availability of resources, it is incorrect to argue on this basis that states have no obligations in relation to these rights. On the contrary, "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."<sup>155</sup>

In the Ogoni case, the African Commission found Nigeria in violation of the right to housing and protection against forced eviction – a "right enjoyed by the Ogonis as a collective right"<sup>156</sup> – the right to health and the right to food: "[w]ithout touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves."<sup>157</sup>

The Committee on Economic, Social and Cultural Rights has also raised the issue of violations of the right to health, to food and to culture:

The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.<sup>158</sup>

The Committee deplores the discrimination against indigenous people, particularly with regard to access to land ownership, housing, health services and sanitation, education, work and adequate nutrition. The Committee is particularly concerned about the adverse effects of the economic activities connected with the exploitation of natural resources, such as mining in the Imataca Forest Reserve and coal-mining in the Sierra de Perijá, on the health, living environment and way of life of the indigenous populations living in these regions.<sup>159</sup>

The Committee has also observed that indigenous peoples are especially vulnerable to violations of the right to food in cases where "access to their ancestral lands may be threatened."<sup>160</sup> In this respect, and in similar terms to those employed by the African Commission,<sup>161</sup> Asbjorn Eide, whose work has had enormous influence on economic, social and cultural rights, states that

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<sup>155</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant) (1990). In, *Compilation of General Comments/ Recommendations, supra* note 7, pps. 18-21, at para. 10. The Committee stated that "[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*." *Id.*

<sup>156</sup> Ogoni Case, at 62-3.

<sup>157</sup> *Id.*, at 65.

<sup>158</sup> General Comment 14, *The right to the highest attainable standard of health* : 11/08/2000. UN Doc. E/C.12/2000/4, 11 August 2000, at para. 27.

<sup>159</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights* : Venezuela. 21/05/2001. UN Doc. E/C.12/1/Add.56, at para. 12.

<sup>160</sup> General Comment No. 12, *The Right to Adequate Food* (Art. 11 of the Covenant), adopted at Committee's Twentieth session, 1999. In, *Compilation of General Comments/Recommendations, supra* note 7, pps. 66-74, at para. 13.

<sup>161</sup> Ogoni Case, para. 45.

In light of evolving practice at the international level, there is now a broad consensus that human rights impose three types or levels of obligations on state parties: the obligations to *respect*, to *protect* and to *fulfil*. ... States must, at the primary level, *respect* the resources owned by the individual, her or his freedom to find a job of preference and the freedom to take the necessary actions and use the necessary resources – alone or in conjunction with others – to satisfy his or her own needs. With regard to the latter, *collective* or group rights can become important: the resources belonging to a collective of persons, such as indigenous populations, must be respected in order for them to be able to satisfy their needs. Consequently, as part of the obligation to respect these resources the state should take steps to recognise and register the land rights of indigenous peoples and land tenure of smallholders whose title is uncertain.<sup>162</sup>

The right to food enjoys a privileged status among economic, social and cultural rights and is the only right labelled “fundamental” under the ICESCR.

The IACHR has also addressed indigenous peoples’ economic, social and cultural rights on a number of occasions. A general principle is, as stated in a report on human rights in Mexico is that “[i]t is the obligation of the State of Mexico, based on its constitutional principles and on internationally recognized principles, to respect indigenous cultures and their organizations and to ensure their maximum development in accordance with their traditions, interests, and priorities.”<sup>163</sup> This language clearly indicates that development efforts must be consistent with indigenous traditions, interests and priorities, all of which presuppose and require a substantial measure of indigenous participation in and agreement with development activities.

Discussing environmental degradation, the IACHR’s 2001 report on Paraguay observes that “[t]he environment is being destroyed by ranching, farming, and logging concerns, who reduce [indigenous peoples’] traditional capacities and strategies for food and economic activity.”<sup>164</sup> It then recommended that Paraguay “[a]dopt the necessary measures to protect the habitat of the indigenous communities from environmental degradation, with special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities.”<sup>165</sup>

In the same report, noting the inadequacy of Paraguay’s efforts to resolve indigenous peoples’ land and resource rights, the IACHR stated that

The process of sorting out territorial claims, to which the Paraguayan State committed itself more than 20 years ago, to benefit the indigenous communities, is still pending. This obligation is not met only by distributing lands. While the territory is fundamental for development of the indigenous populations in community, it must be accompanied by health, education, and sanitary services, and the protection of their labor and social security rights, and, especially, the protection of their habitat.<sup>166</sup>

Consequently, not only must sufficient lands and resources be legally recognized or otherwise transferred to indigenous peoples, a measure fundamental to indigenous development, the environmental integrity of those lands must be guaranteed and the state must ensure that indigenous peoples enjoy adequate health, education and sanitary services, presumably of at least the same quality as those enjoyed by non-indigenous persons.

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<sup>162</sup> A. Eide, *Promoting economic, social and cultural rights: Obligations of states and accountability of non-state actors*. Paper presented at Second Global Forum on Human Development Candido Mendes University, Rio de Janeiro, Brazil, 9-10 October 2000, at p. 11-12. Available at: <http://www.undp.org/hdro/events/rioforum/eide.pdf>

<sup>163</sup> *Report on the Human Rights Situation in Mexico*. OEA/Ser.L/V/II.100 Doc. 7 rev. 1 (1998), at para. 577.

<sup>164</sup> *Third Report on the Human Rights Situation in Paraguay*, *supra* note 40, Chapter IX, at para. 38.

<sup>165</sup> *Id.*, at para. 50(8).

<sup>166</sup> *Id.*, at para. 47.

In its 2000 report on human rights in Peru, the IACHR condemned the severe impact of resource extraction operations on the indigenous communities of the Amazon region, observing that “The actions of the lumber and oil companies in these areas, without consulting or obtaining the consent of the communities affected, in many cases lead to environmental degradation and endanger the survival of these peoples.”<sup>167</sup> To mitigate the negative impact, it recommended that Peru “improve access to the public services, including health and education, for the native communities, to offset the existing discriminatory differences, and to provide them dignified levels in keeping with national and international standards;”<sup>168</sup> and, “[t]hat it help strengthen the role of the indigenous populations so that they may have options and be able to retain their cultural identity, while also participating in the economic and social life of Peru, with respect for their cultural values, languages, traditions, and forms of social organization.”<sup>169</sup>

Finally, various economic, social and cultural rights are also addressed in other binding treaties.<sup>170</sup> Article 24 of the Convention on the Rights of the Child, for instance, obliges states to recognize “the right of the child to the enjoyment of the highest attainable standard of health” and to provide all children with “adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.” Article 14(2)(h) of the Convention on the Elimination of Discrimination Against Women (CEDAW) obliges states to “ensure to women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply ....”<sup>171</sup> Article 12 of CEDAW requires states to eliminate discrimination in provision of health care so as to ensure that women are able to meet their health goals and needs. In this context, the UN Committee on the Elimination of Discrimination Against Women has advised states that “special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, [including] ... indigenous women.”<sup>172</sup>

## 6. The World Bank’s Policy on Indigenous Peoples:

Responding to widespread criticism from civil society and certain borrower governments regarding the social and environmental damage caused by its projects, in early 1981 the World Bank began developing what have come to be called ‘safeguard policies’ designed to protect vulnerable peoples and environments against such damage. The first policy, on involuntary resettlement was established in 1980, and the first operational directive on indigenous people, then known as OMS 2.34, was written in 1982. The current safeguards constitute *minimum standards* that have been developed through actual experience. They are not idealised regulations, but rather essential preconditions for sustainable development. Without adherence to safeguard policies, the basic function of development aid and the Bank’s mandate are liable to be negated, especially if project implementation is not in accordance with target communities’ needs and aspirations.

Strong, unambiguous and mandatory safeguard policies are important to civil society because they constitute the only mechanism available to citizens and project beneficiaries to hold the

<sup>167</sup> *Second Report on the Human Rights Situation in Peru*, *supra* note 40, Ch. X, at para. 26.

<sup>168</sup> *Id.*, at para. 39(2).

<sup>169</sup> *Id.*, at para. 39(7).

<sup>170</sup> See, also, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (1988), entered into force November 16, 1999, *OAS. Treaty Series*, No. 69.

<sup>171</sup> CEDAW has been ratified by 170 states as of December 2002.

<sup>172</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24, Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women - women and health (1999). In, *Compilation of General Comments/Recommendations*, *supra* note 7, pps. 244-51, at para. 6.

World Bank and its clients accountable for their operations. The safeguard policies are the principal instruments the World Bank has to ensure that its projects and programmes are consistent with international human rights and environmental law (see section 7). They also provide an agreed basis upon which to lay loan negotiations with borrowers and clients. In addition, the World Bank's safeguard policies provide benchmark norms and standards upon which other development actors in the international community base their investment and strategies. And the Bank concurs that "[the Bank's Safeguard Policies] have become internationally recognised references"<sup>173</sup>. In this light, it is essential that the World Bank maintain safeguards that accurately reflect the needs and aspirations of the communities where it is operating.

In 1999, and steadily growing since, 58% of the Bank's portfolio was composed of structural and programmatic lending<sup>174</sup>, and today much of it is linked to so-called 'Poverty Reduction Strategy Papers' (PRSPs) and, to these types of loans, most of the safeguard policies do not apply. As the Bank now moves to apply its 'Comprehensive Development Framework', which seeks to encourage all borrower countries to develop national development visions aimed at poverty reduction, it is expected that more and more lending to borrower governments will be 'programmatic' loans and credits from the two sections of the World Bank Group which deal with governments, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). At the same time specific projects, it is predicted, will increasingly be funded by the private sector arm of the Bank, the International Finance Corporation (IFC), or provided with political risk insurance through the Bank's Multilateral Investment Guarantee Agency (MIGA). Consequently, it is essential that safeguard policies apply to such lending as well, and that appropriate mechanisms are set in place to assure their implementation.

*The World Bank's Indigenous Peoples' policy, Operational Directive 4.20*

The Indigenous Peoples Policy, first known as the OMS 2.34, was first revised in 1991 to become the Operational Directive (OD) 4.20, and is now undergoing a second process of revision to become the OP/BP 4.10. The purpose of the OD 4.20, which is currently in force, is to ensure "*that the development process fosters full respect for their dignity, human rights and cultural uniqueness*". In sum, OD 4.20 ensures that in World Bank assisted projects, borrower governments commit to securing indigenous rights, legal mechanisms are set in place to secure land tenure and resource rights, indigenous peoples are protected from adverse effects during the development process, that the economic and development benefits received from the project are culturally appropriate and that projects where negative impacts cannot be adequately ameliorated are not approved by the Bank.

OD 4.20 also includes the fundamental provision that all investment projects affecting indigenous peoples should include an 'Indigenous Peoples Development Plan' (IPDP)<sup>175</sup>. This plan or component must, first and foremost "be based on the full consideration of the options preferred by the indigenous people affected by the project", and it must "*anticipate adverse trends likely to be induced by the project*". Crucially, OD 4.20 stresses that the IPDP requires

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<sup>173</sup> World Bank, 2001. Environment Matters at the World Bank, p22. The World Bank Group.

<sup>174</sup> Bank Information Center, 2001. Questions & Answers about The World Bank's Lending. Toolkits for Activists, issue 5.

<sup>175</sup> See Inspection Panel (2000) *The Qinghai Project: a component of the China-Western Poverty Reduction Project (Credit No.3255-CHA and Loan No.4501-CHA)* Inspection Panel Investigation Report, April 28, 2000, at page xxvi

long lead times and extended follow-up and that local cultural beliefs and systems must be taken into account.

The IPDP must also involve:

- an assessment of the national legal framework regarding indigenous peoples
- compilation of baseline data about the indigenous peoples to be affected
- a mechanism for the legal recognition of indigenous peoples' rights, especially tenure rights
- sub-components on health care, education, legal assistance and institution building
- capacity-building of the government agency dealing with indigenous peoples
- a clear schedule for fitting actions related to indigenous peoples into the overall project, with a clear and adequate budget.<sup>176</sup>

#### *Problems with OD 4.20*

The Bank's 1991 Indigenous Peoples Policy has significant deficiencies such as its failure to make explicit reference to ILO Convention 169 and its disregard for the right to prior informed consent. Despite these serious problems, and although it is insufficient as it stands, if implemented properly, OD 4.20 can help safeguard the rights of indigenous communities affected by World Bank projects.

The problems of OD 4.20 lie largely in the fact that it was not designed with the participation of indigenous people, even though, prior to its publication, some indigenous peoples' organisations, such as the Amazonian indigenous alliance, COICA, made specific demands as to the content of the policy:

- Inclusion of the recognition of indigenous peoples' rights as set out in international law;
- Elaboration of the policy in direct consultation with indigenous peoples;
- prior consent of indigenous peoples be mandatory before implementation of a World Bank project;
- They demanded participation of indigenous peoples throughout the project cycle;
- Establishment of tripartite commissions, including funders, government representatives and indigenous peoples' representatives to oversee project implementation;
- Prioritisation of indigenous peoples' development needs and aspirations.<sup>177</sup>

None of these demands were provided for in the OD 4.20, rendering it an unsuitable protection of the livelihoods and requirements of indigenous peoples under World Bank operations.

#### *Indigenous Peoples' development aspirations and OD 4.20*

Although the World Bank and bilateral development agencies tend to argue that people of the developing world aspire to the lifestyle of the western world, and that NGOs opposing the market-based development model are "anti-development", it is not so simple. Local communities and indigenous peoples have witnessed the human distress and ecological imbalance that the western development model has led to, and they are often unwilling to choose this model for themselves. Indigenous peoples are often vocally opposed to unsustainable development programmes, such as those promoting the extractive industries, as a model for poverty alleviation. Their close physical, spiritual, cultural and religious ties to their land make them unwilling to proceed with development likely to break the fragile equilibrium of the ecosystems they rely on. In the words of Western Shoshone tribal member, Berenice Lalo: "*Our*

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<sup>176</sup> OD 4.20 paragraphs 14 and 15.

<sup>177</sup> IWGIA, 1990, *Indigenous World 1989-1990*, International Work Group for Indigenous Affairs, Copenhagen.

*people will be here, because according to our traditions in this valley, this is where we came. This is where we exist, and when mining comes, it's a form of genocide ... a systematic destruction of a race of people. And when this comes in, this mining comes in, it is a destruction of our way of life.*" Indeed, the sheer number of Indigenous global anti-mining and anti-oil campaigns is evidence of this fact. Sustainable development in the true sense, where the future of the earth and its inhabitants is foremost, is the aspiration of most indigenous peoples, and the Kimberly Declaration of September 2002 is a testimony to this. The World Bank ignores this aspiration: (i) by not including international standards of human rights in OD 4.20, and (ii) by failing to respect the principle of self-determination, thereby foregoing the most appropriate method for ensuring that targeted peoples and communities fully benefit from proposed development projects.

#### *Problems with implementation of OD 4.20*

Despite these serious failings, OD4.20 is considered to be an improvement the Bank's previous policy on Indigenous Peoples (OMS 2.34). Unfortunately, the quality of implementation of OD 4.20 in the 1990s has been patchy and often poor<sup>178</sup>.

The most important shortcoming of the OD 4.20 is that it has rarely, if ever, been implemented to its full extent. A participatory study carried out by Forest Peoples Programme in 1999<sup>179</sup> and 2000, found that implementation of the safeguards by Bank staff and borrower countries was weak. In many projects, most of the fundamental issues regarding indigenous people were seriously overlooked or swept under the carpet. Indigenous Peoples Development Plans were rarely included, or were severely lacking in adequate provisions.

This report prompted the World Bank to initiate its own review process, and in 2000, the Operations Evaluation Department began reviewing implementation of the OD 4.20 by Bank staff. A recent report of the OED review confirms the poor pattern of compliance reported by studies and surveys conducted by NGOs. Its survey of 89 closed projects that had affected indigenous peoples during the period 1992-2001 found, for example, that only 58% had applied the OD and that just twelve projects (14%) had self-standing Indigenous Peoples Development Plans as required under OD 4.20.<sup>180</sup> The same review found that the participation of indigenous peoples in decision-making in Bank projects affecting them was "low" and that just 20% of projects had included clear benchmarks for monitoring to measure impacts on indigenous communities<sup>181</sup>.

These shortcomings are equally apparent in oil, gas and mining projects. This research has identified a large number of projects and interventions, where the World Bank seems unable to implement its safeguard policies and fails to address fundamental problems that need to be sorted out before projects are approved. In India for example, none of the environmental and

<sup>178</sup> Griffiths, T and Colchester, M (2000) *Indigenous Peoples, Forests and the World Bank: policies and practice* FPP, Moreton-in-Marsh

<sup>179</sup> *ibid*

<sup>180</sup> Note that while the OED accepts management's arguments that an Indigenous Peoples Development Plan (IPDP) is only required in projects with potentially negative impacts on indigenous communities under paragraph 13 of the Directive, the World Bank Inspection Panel has ruled that the provision is quite clear that an IPDP is required for all investment projects affecting indigenous peoples – see Inspection Panel (2000) *The Qinghai Project: a component of the China-Western Poverty Reduction Project (Credit No.3255-CHA and Loan No.4501-CHA)* Inspection Panel Investigation Report, April 28, 2000 a page xxvi.

<sup>181</sup> Operations Evaluation Department – OED (2003) *Implementation of Operational Directive 4.20 on Indigenous Peoples: an independent desk review* January 10, 2003, Country Evaluation and Regional Relations (OEDCR), OED, Washington, DC  
[http://Inweb18.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/472DE0AEA1BA73A085256CAD005CF102/\\$file/IP\\_evaluation.pdf](http://Inweb18.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/472DE0AEA1BA73A085256CAD005CF102/$file/IP_evaluation.pdf)

social problems of existing National Thermal Power Corporations (NTPC) operations were “fully addressed prior to negotiations”<sup>182</sup>, and no safeguard policy was implemented before operations started. The World Bank’s answer to these serious failings was the preparation of various retroactive Environmental and Social Action Plans in the Singrauli area, and yet even these do not consider “the impact on the broader social environment” and do not “foresee socio-economic studies on the fate of the earlier project affected people, and resettlement and rehabilitation action plans”<sup>183</sup>. In addition by the time these action plans were initiated in 1998, 85% of the new loan was already disbursed. If the safeguard measures put in place by the Bank are to be of any use and profit for the sustainable development of the communities benefiting from its loans, at a minimum they must be applied and adhered to in a timely manner.

Examples of World Bank projects not complying with the institution’s own policies abound, and recent examples can be found in the Inspection Panel report on the Coal India Social and Environmental Mitigation Project, as well as that on the Chad portion of the Chad-Cameroon Pipeline. In Cameroon also, the indigenous Bagyéli pygmies, who are directly effected by the construction of the pipeline, were not adequately involved in the development of an Indigenous Peoples Development Plan, which is now tardily being designed and implemented piecemeal and in a retroactive way after the social impacts of pipeline construction.

In Bolivia, the construction of two pipelines, the Cuaiba and the Bolivia-Brazil Gas Pipeline, led to post-project implementation of inadequate IPDP’s, which did not even provide the fundamental (and OD 4.20-required) legal land demarcation processes to the “beneficiary” indigenous populations. To varying extents, non-compliance to the minimum (and in the main, deficient) standards set out in its safeguard policies is the norm, as evident in the recent OED implementation review of OD 4.20.

*Revision of OD 4.20:*

Over the past few years, the World Bank has undertaken a systematic ‘conversion’ of its safeguard policies, which has largely resulted in the release of weakened and watered down versions of the policies’ predecessors (see box on panel-proofing the guidelines for a discussion on the revision process). In the line with this revision process, the OD 4.20 was converted into the draft OP/BP 4.10 in 1998.

Two consultations with indigenous organisations were undertaken, in 1998/99 and 2001/02<sup>184</sup>. However this process has been roundly condemned for being rushed and for lacking informed and representative indigenous participation, and for failing to meet the Bank’s own guidelines on meaningful public consultation.<sup>185</sup>

<sup>182</sup> see Bosshard, P., 1999. Energy from Dante’s Inferno. Berne Declaration. <http://www.ecb.ch>

<sup>183</sup> idem supra

<sup>184</sup> For records of 1998-99 consultations, see: <http://Inweb18.worldbank.org/essd/essd.nsf/28354584d9d97c29852567cc00780e2a/5e23e566bed37cd6852567cc0077f48d?OpenDocument>

World Bank (2002) *Summary of Consultations with External Stakeholders regarding the World Bank Draft Indigenous Peoples Policy (OP/BP 4.10)* - last updated 7 October 2002  
[http://Inweb18.worldbank.org/ESSD/essd.nsf/1a8011b1ed265afd85256a4f00768797/c4a768e4f7c935f185256ba5006c75f3/\\$FILE/SumExtConsult-4-23-02.pdf](http://Inweb18.worldbank.org/ESSD/essd.nsf/1a8011b1ed265afd85256a4f00768797/c4a768e4f7c935f185256ba5006c75f3/$FILE/SumExtConsult-4-23-02.pdf)

<sup>185</sup> - Tebtebba Foundation (2001a) *Report on the Stakeholders consultation on the World Bank’s draft policy on Indigenous Peoples (OP/BP4.10)*, 22 October 2001

- Tebtebba Foundation (2001b) *Statement of the TEBTEBBA Foundation ((Indigenous Peoples’ International Centre for Policy Research and Education) and the Cordillera Peoples’ Alliance on the Stakeholder’s Consultation on the World Bank’s Draft Policy on Indigenous Peoples (OP/BP4.10)*;

- Transparencia (2001) *Mesa de trabajo sobre derechos indígenas: revisión de la políticas 4.20 y 4.10 del Banco Mundial* Oaxaca, agosto de 200

OP 4.10 has been refuted by the Indigenous Peoples' Organisations<sup>186</sup>, as it is a severely weakened version of OD 4.20, and does not take into account their fundamental demands, which are the following:

- be based on a thorough participatory *implementation review* of the existing policy (OD4.20) to ensure that any revisions are derived from practical lessons based on the actual experience of indigenous peoples with World Bank operations.
- address the concerns and priorities of indigenous peoples;
- adopt the indigenous right to "self-identification" in accordance with the principles set out in Article 8 of the UN Draft Declaration on the Rights of Indigenous Peoples.
- further specify that securing indigenous land and resource rights be an essential precondition for project appraisal and approval with concrete benchmarks to ensure compliance.
- require "effective" participation by indigenous peoples affected by Bank loan operations throughout the project cycle.
- prohibit involuntary resettlement of indigenous peoples. Resettlement may only take place with the full, prior, free and informed consent of affected indigenous communities.
- recognise the indigenous right to "prior, free and informed consent" to any developments proposed on their lands and territories as specified under Article 30 of the UN Draft Declaration on the Rights of Indigenous Peoples.
- include an environmental audit in baseline studies that properly values indigenous peoples' resources and territories. Any use of indigenous knowledge in such studies must incorporate adequate intellectual property rights safeguards and benefit sharing mechanisms.
- ensure consultations include traditional leaders as well as local indigenous organisations.
- require the involvement of affected indigenous peoples in *negotiations* between the World Bank and the client government regarding loan agreements;

- Selverston-Scher, M (2001) *World Bank consultation on the revision of the IP policy (OP4.10) - "Andean Region"*, 22-23 October 2001, Cuzco, Peru/BIC, Washington, DC

- Sulyandziga, R (2001) *Discussion on OP4.10 of the World Bank Concerning Indigenous Peoples: information about consultations held in Khabarovsk, Moscow and Nar'yan Mar, October 2001* Russian Indigenous Peoples of the North Training Centre;

- CONAIE and CONIVE (2001) *Declaración de la Confederación de Nacionalidades Indígenas del Ecuador y el Consejo Nacional Indio de Venezuela en el marco de la consulta regional andina sobre población indígena del Banco Mundial* 23 de octubre de 2001

- CORE (2001) *Statement of Core (Indigenous Peoples' Advocacy and Resource Centre for India's North East) external stakeholders consultation on the World Bank's Draft Policy on Indigenous Peoples (OP/BP4.10)*, New Delhi, India, 26 November 2001.

- *Declaración de los pueblos indígenas participantes en la 19 Sesión del Grupo de Trabajo sobre Poblaciones Indígenas de las Naciones Unidas sobre las preocupaciones acerca de las políticas del Banco Mundial* Ginebra, Julio de 2001.

- Center for Economic and Social Rights (CESR)(2001) Letter sent to World Bank signed by 140 indigenous peoples' organisations, NGOs and individuals, 14 December 2001

<sup>186</sup> Indigenous Peoples' Declaration (2001) *Declaración de los pueblos indígenas participantes en la 19 Sesión del Grupo de Trabajo sobre Poblaciones Indígenas de las Naciones Unidas sobre las preocupaciones acerca de las políticas del Banco Mundial* Ginebra, Julio de 2001.

-Tebtebba Foundation (2001) *Statement of the TEBTEBBA Foundation ((Indigenous Peoples' International Centre for Policy Research and Education) and the Cordillera Peoples' Alliance on the Stakeholder's Consultation on the World Bank's Draft Policy on Indigenous Peoples (OP/BP4.10)*;

-Asian Indigenous and Tribal Peoples Network -AITPN (2002) *The World Bank Defaults on Past Promises: why the World Bank's draft policy on Indigenous Peoples should be rejected* AITPN, New Delhi

-Indigenous Peoples Declaration (2002) *Indigenous Peoples' Statement to a Roundtable Discussion on the Revision of the World Bank Policy on Indigenous Peoples, 18 October 2002*, Washington, D.C.

- include requirements for involving local, national and regional indigenous organisations in active tracking and monitoring of World Bank operations through the whole project cycle.
- require the proactive circulation of information in local languages to indigenous organisations and communities affected by Bank loan operations.

By inadequately addressing the human rights issues of indigenous peoples, especially with regards to land and resource rights, by failing to comply with the Bank's obligations under international law, and by doing nothing to ensure that borrowers do not violate their own obligations under international human rights standards, the OP 4.10 is at odds with the World Bank's professed mandate for effective poverty reduction and its mission to promote good governance and rule of law in developing countries.<sup>187</sup>

## 7. The World Bank and Human Rights:

The World Bank has no formal, written policy on human rights, either in terms of the Bank's role, or lack thereof, in promoting and requiring respect for human rights in its operations or internally in terms of its policies. OP 4.20 on Indigenous Peoples of 1991 is the only operational policy that explicitly mentions human rights and the Bank has never officially stated its understanding of the term 'human rights' in that directive.

Whether the World Bank has legal obligations to respect human rights turns a) largely on the legal interpretation given to the Bank's Articles of Agreement (its Constitutional instrument) and its Relationship Agreement with the United Nations and; b) an examination of the status of the Bank in the international legal system and whether a duty to respect human rights attaches to that status. In other words, two fundamental questions are: I. is the Bank prohibited from or limited in some way from addressing and accounting for indigenous peoples' and other human rights by its Articles and; II is the Bank a subject of international law bound by its norms?

The Bank has long maintained that it is not required to respect and promote all human rights in its operations and policies. Similarly, it also maintains that it cannot require that its borrowers respect human rights in connection with Bank-funded projects.

There are two main arguments the Bank makes to support these positions:

- a) The Bank's Articles of Agreement is the highest law applying to the Bank, prohibits it from interfering in the political affairs of its members and requires that all of its decision-making must be based solely on economic considerations, and;
- b) Its borrowers are sovereign states and, therefore, the Bank may not require that they account for and respect human rights in Bank-funded projects because this would be illegitimate interference in the internal affairs of their borrowers.

The prevailing interpretation within the Bank of its Articles leads to a classification of human rights issues as either economic or political; those that can be classified as economic, social or cultural rights are legitimate and cognizable, those classified as political rights are beyond the jurisdiction of the Bank. For this reason, the Bank has often highlighted what it perceives to be its contribution to furthering economic, social and cultural human rights through poverty alleviation, while disregarding the majority of civil and political rights<sup>188</sup> -- "For the World

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<sup>187</sup> MacKay, F (2002) "Universal Rights or a Universe Unto Itself? Indigenous peoples' human rights and the World Bank's draft OP4.10 on Indigenous Peoples" *American University International Law Review* 17(3):527-624.

<sup>188</sup> See, generally, *Development and Human Rights: The Role of the World Bank*: Washington DC: World Bank (1998).

Bank, protecting and advancing human rights means helping the world's poorest people escape poverty."<sup>189</sup>

The counter argument made by numerous scholars, lawyers and UN experts states, on the first point, that interpretation of the term 'political affairs' must occur in the context of contemporary international law. This position is supported by the International Court of Justice, which stated that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation."<sup>190</sup> In contemporary international law, human rights are considered to be of international concern rather than the domestic political affairs of states. As Judge Weeramantry of the International Court of Justice observed

In its ongoing development, the concept of human rights has long passed the stage when it was a narrow parochial concern between sovereign and subject. We have reached the stage, today, at which the human rights of anyone, anywhere, are the concern of everyone, everywhere.<sup>191</sup>

The UN Charter has a similar provision prohibiting interference in internal political affairs.<sup>192</sup> However, it is standard and accepted practice within the UN that this provision does not apply to human rights, which are deemed of international concern and therefore not solely within the internal sovereign or political sphere of states.<sup>193</sup>

With regard to the term 'only economic considerations', it is well documented that human rights have economic implications and therefore such rights can also be characterized as economic considerations. For instance, World Bank studies show that countries with good human rights records have greater success in implementing Bank-funded economic development projects and receive higher levels of investment than countries with bad records.<sup>194</sup> Similarly, World Bank publications have recognized the economic costs of discrimination against indigenous peoples.<sup>195</sup> James Wolfensohn, the current President of the Bank, goes further stating unequivocally that "Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible."<sup>196</sup>

On the second point, the vast majority of the Bank's members have voluntarily committed themselves to abide by human rights standards through ratification of international conventions, through the formation of international customary human rights norms and, in some cases, by

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<sup>189</sup> Id., at 30.

<sup>190</sup> Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, *ICJ Rep.* 16 (1971), at 31.

<sup>191</sup> *Separate Opinion of Judge Weeramantry, Bosnia and Herzegovina v. Yugoslavia*, 11 July 1996.

<sup>192</sup> U.N. Charter, Art. 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ...."

<sup>193</sup> See, among others, *Vienna Declaration and Programme of Action of the UN World Conference on Human Rights* (1993), Sec. II, para. 2: "The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of human rights is a legitimate concern of the international community."

<sup>194</sup> J. Isham, D. Kaufmann and L. Pritchett, *Civil Liberties, Democracy, and the Performance of Government Projects*, 11 *The World Bank Economic Review*, 1997.

<sup>195</sup> H.A. Patrinos, *The Costs of Discrimination in Latin America*. Human Capital Development and Operations Policy, HCO Discussion Papers. Washington DC: World Bank. See, also, G. Psacharopoulos & H.A. Patrinos (eds.), *INDIGENOUS PEOPLE AND POVERTY IN LATIN AMERICA: AN EMPIRICAL ANALYSIS* Washington, DC: The World Bank. (1994).

<sup>196</sup> *A Proposal for a Comprehensive Development Framework, Memorandum from James Wolfensohn, President of the World Bank, to the Board, Management and Staff of the World Bank Group*, Jan. 21, 1999.

assenting to UN and other declarations.<sup>197</sup> In doing so, they have accepted international obligations to promote, respect, protect and fulfill human rights and, in many cases, international oversight of their compliance with these obligations. As stated by Judge Weeramantry of the ICJ, “there is not even the semblance of a suggestion in contemporary international law that [human rights] obligations amount to a derogation of sovereignty.”<sup>198</sup>

Integration of human rights issues into Bank policy setting and operational activities would, in the majority of cases, merely restate aims, objectives and obligations to which the vast majority of its members have already subscribed. In states with a monist legal system<sup>199</sup> – a significant number of Bank members – these international obligations are an integral part of their domestic law; in dualist states<sup>200</sup> they have been incorporated, or are required to be incorporated, into domestic law.<sup>201</sup>

*The Legal Obligations of the Bank to Respect Human Rights :*

The preceding shows that there are strong legal arguments that the Bank’s Articles cannot prohibit attention to and respect for all human rights and that state sovereignty is not a valid excuse for not requiring that borrowers respect human rights in Bank-funded operations. However, it does not address the more fundamental issue of whether the Bank has a legal *obligation* to respect, promote and protect human rights.

The Bank has legal obligations to respect human rights and to account for these rights in its safeguard policies and operations for four reasons:

- a. The Bank is a subject of international law bound by its rules and norms ;
- b. The Bank, as a general principle and as a Specialized Agency of the United Nations, has obligations derived from the human rights provisions of the Charter of the UN and international human rights instruments interpreting and elaborating upon those provisions;
- c. The Bank is an international organization created by and comprised of states, each of which has an obligation to promote and respect human rights both individually and through collective action; the Bank is one place such collective action is required, and;
- d. The Bank is required by general international law not to interfere with or facilitate violations of its borrowers international obligations, including those pertaining to human rights.

A subject of international law is an entity capable of possessing international rights and duties as well as the capacity to enforce these in international tribunals. The Bank is regarded as a subject of international law by scholars and the Bank itself. As a subject of international law, the Bank has rights and duties, separate from and in addition to its member states, defined by international law.

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<sup>197</sup> Of the Bank’s 181 members, 144 have ratified the International Covenant on Civil and Political Rights, 142 the International Covenant on Economic, Social and Cultural Rights and 179 the Convention on the Rights of the Child.

<sup>198</sup> *Separate Opinion of Judge Weeramantry, Bosnia and Herzogovenia v. Yugoslavia*, 11 July 1996.

<sup>199</sup> Monist legal systems are those in which international law, including ratified international instruments, are considered to be part of an integrated whole together with domestic law.

<sup>200</sup> Dualist legal systems are those which consider international and domestic law to be separate and distinct, the former entering the latter only by way of act of Parliament incorporating international law directly into domestic law.

<sup>201</sup> Article 2(2) of the ICCPR, for instance, “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

Neither the Bank nor its Articles are above the law; as the International Court of Justice observed, “international organizations are bound by any obligations incumbent upon them under general rules of international law....”<sup>202</sup> These general rules include principles of customary international law, *jus cogens* norms, such as the right to self-determination, the right to life and the prohibition of systematic racial discrimination, and international obligations *erga omnes*. The latter are duties owed by states “towards the international community as a whole...,”<sup>203</sup> and derive from, among others, the prohibition of genocide and “from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>204</sup> Based in part on this statement, the International Law Institute has supported the proposition that the general obligation to respect human rights is itself an obligation *erga omnes*.

Concerning treaties, the general rule of international law is that third parties are not bound by treaties without their express consent.<sup>205</sup> The Bank is not party to any human rights conventions and therefore is not directly bound. This does not mean however that these instruments are irrelevant to the Bank’s obligations: they may restate or inform the content of binding rules of customary international law,<sup>206</sup> they set out the obligations of most Bank members, and they elaborate upon the human rights provisions of the UN Charter, a source of obligations for both the Bank and its members (see below).

*The UN Charter and the Bank as a Specialized Agency:*

Both the Bank and its members have obligations under the UN Charter that supercede the provisions of the Bank’s Articles.<sup>207</sup> Article 103 of the Charter states unequivocally that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international instrument, their obligations under the present Charter shall prevail.” Article 1(3) of the UN Charter defines one of the primary purposes and principles of the UN to be “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” Under the heading “International Economic and Social Cooperation,” Article 55 of the Charter requires the UN to promote “universal respect for, and observance of human rights and fundamental freedoms for all ....” The UN Charter’s provisions on human rights are therefore directly relevant to the larger issue of the Bank’s responsibility towards human rights.

The Bank is also a Specialized Agency of the UN. Its status as a specialized agency of the UN, and the nature of the relationship between the Bank and UN, is based upon and defined by a treaty known as the Relationship Agreement.<sup>208</sup> Article 4(3) of the Relationship Agreement stresses that the Bank is an independent organization and recognizes that

<sup>202</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt. International Court of Justice, *Reports of Judgment, Advisory Opinions and Orders*. (1980), at 89-90.

<sup>203</sup> Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, *ICJ Rep.*, 32, paras. 33-4, at 33. (1970); *reaffirmed in*, East Timor (Portugal v Australia) *ICJ Reports* (1995), 90 *et seq.* and, Bosnia Herzegovina v. Yugoslavia, Preliminary Objections, *ICJ Reports* (1996), 595 *et seq.*

<sup>204</sup> *Id.*, at para. 34.

<sup>205</sup> Art. 34, Vienna Convention on the Law of Treaties (1969).

<sup>206</sup> A rule in a treaty may become binding on non-parties if it becomes part of international customary law. Art. 38, Vienna Convention on the Law of Treaties (1969) and Art. 38, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

<sup>207</sup> I. Shihata, the former General Counsel of the Bank stated that: “Members’ obligations under the UN Charter prevail over their other treaty obligations, including their obligations under the Bank’s Articles of Agreement, by force of an explicit provision in the UN Charter (Article 103). The Bank itself is bound, by virtue of its Relationship Agreement with the UN, to take note of the above-mentioned Charter obligations assumed by its members ....”

<sup>208</sup> Agreement Between the United Nations and the International Bank for Reconstruction and Development, Nov. 15, 1947, 16 *U.N.T.S.* 346

action to be taken by the Bank on any loan matter is to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. The United Nations recognises, therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to the terms or conditions of financing by the Bank.

While this provision provides for a much looser association between the UN and the Bank than exists between the UN and other specialized agencies, it relates only to UN involvement in Bank-decision making processes rather than any larger responsibility the Bank may have under the UN Charter or international law in general. Skogly observes that, "part of the reasoning behind bringing these organizations [specialized agencies] into a formalised relationship with the UN must have been to grant them, both legally and practically, rights and obligations in relationship to the UN ..."<sup>209</sup> These obligations, at a minimum, include respect for the principles and purposes of the UN. Therefore, as a specialized agency of the UN, the Bank has obligations derived from the UN Charter, in particular to act in conformity with the Charter.<sup>210</sup> This means that the Bank's policies, internal and external, and operations must be formulated and implemented in accordance with the Charter's provisions related to human rights.

The Charter's provisions dealing with human rights are very basic. Other than self-determination, the only right explicitly mentioned is the prohibition of discrimination. Partly for this reason, in 1948, the UN General Assembly adopted the Universal Declaration of Human Rights to elaborate upon and specify the Charter's human rights provisions and obligations. The Universal Declaration, wholly or in part, is widely considered to express general principles of international law and binding norms of customary law despite its non-binding status when adopted.<sup>211</sup> Subsequent codification of human rights by the UN, the International Covenants and CERD in particular, has also further clarified ambiguities in the meaning of the Charter's provisions. Professor Sohn observes that, although the Covenants

resemble traditional international agreements which bind only those who ratify them, it seems clear that they partake of the creative force found in the Declaration and constitute in a similar fashion an authoritative interpretation of the basic rules of international law on the subject of human rights which are embodied in the Charter of the United Nations. ... Consequently, ... they are of some importance ... with respect to the interpretation of the Charter obligations of the non-ratifying states.<sup>212</sup>

Presumably this would also apply to the Charter obligations of non-ratifying subjects of international law, especially members of the UN system such as the Bank. The jurisprudence of the UN bodies, such as the Human Rights Committee and the Committee on the Elimination of All Racial Discrimination, charged with monitoring state compliance with human rights instruments is also important in this context. Their interpretations of the human rights instruments not only inform the obligations of state-parties, they also develop greater understanding of the nature of Charter-based obligations.

The conclusion that can be drawn from the preceding is that the Bank has obligations towards human rights derived from the UN Charter, both as a general principle of international law and

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<sup>209</sup> S. Skogly, HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND IMF, at 100.

<sup>210</sup> Id., 99-102.

<sup>211</sup> The International Court of Justice recognized the obligatory force of the Charter and Declaration in, among others, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), *ICJ Rep.* 3, 42, 1980.

<sup>212</sup> L. Sohn, The Human Rights Law of the Charter, 12 *Tex. Int'l LJ* 129, 135-36 (1977).

as a Specialized Agency. These obligations also extend to at least the core rights set forth in the Universal Declaration and UN human rights treaties, as these instruments are simply interpretations of the Charter's human rights provisions.

The obligations of the Bank's members are relatively straightforward. As members of the UN, Bank members are legally bound by the UN Charter "to take a joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55" (see, para. 14, above).<sup>213</sup> This obligation also requires that states act in conformity with human rights guarantees in their conduct within and with the Bank, for instance, as members of the board, as policy setters and as borrowers.

While the Bank has rights and duties separate from and in addition to its member states, the obligations of its members states are not irrelevant. On the contrary, the Bank is obliged, as is any other subject of the law, to ensure that it neither undermines the ability of other subjects, including its members, to faithfully fulfill their international obligations nor facilitates or assists violation of those obligations.<sup>214</sup> This duty is binding on all subjects of international law. This adds an extra dimension to the obligations of the Bank and requires that its policies and operations account for and respect the obligations of its members under ratified human rights conventions, regional as well as universal, and other sources of law binding on them.

As parties to UN and regional human rights instruments, the Bank's members are obligated to respect, ensure and fulfill the rights set forth in those instruments. What this means in practice will vary depending on the specific obligations of the various members of the Bank and how those obligations are implicated in Bank-financed activities. On a policy level, the Bank is obliged to ensure that policy formulation and implementation account for and respect its members' human rights obligations. Bradlow and Grossman concur: "in general, it is safe to assume that the IFIs should perform their functions in a way which supports the fundamental rights of individuals and peoples."<sup>215</sup>

Finally, it is relevant in this context to note that the Bank's Operational Policy 4.01 on Environmental Assessment clearly states that "the Bank takes into account ... the obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA" (para. 3 ). If this is possible with regard to environmental obligations, is there a compelling reason why human rights obligations should not be accorded equal status?<sup>216</sup>

## **8. The World Bank Experience:**

The purpose of this section is to highlight some of the experience of Indigenous Peoples at the hands of extractive industries projects and particularly look at the contribution the Bank has

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<sup>213</sup> Article 56, Charter of the United Nations.

<sup>214</sup> The World Bank, the IMF and Human Rights, at 63; and, D. Bradlow & C. Grossman, Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF. 17 *Human Rights Q.* 411, 428;

<sup>215</sup> D. Bradlow & C. Grossman, Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF. 17 *Human Rights Q.* 411, at note 63.

<sup>216</sup> During a meeting with human rights NGOs in Prague in September 2000, the Bank's President, James Wolfensohn, committed to "making explicit reference to human rights in Bank documents," and "to work with Bank staff to include human rights in their policy documents ...." Human Rights Watch, Press Release, 22 September 2000, 'NGOs Urge Implementation of Wolfensohn Commitment to Human Rights'.

made to this experience. This draws therefore from both the experiences presented in from the case studies discussed at the workshop and other documented experiences.

The mining industry has long been subject to criticism for its lasting detrimental impacts on the environment and the communities affected by its operations. Abuses have taken various forms as is illustrated in some of the cases cited. Scrutiny and protest have increased in recent years and have reached a point where they can and have led to the cancellation of some funding and projects, including projects involving the Bank.

#### *Impacts on Indigenous Peoples*

Indigenous peoples have always carried a disproportionately high burden of extractive industries projects within their territories. This is even true in the USA, Canada and Australia where the mining industry is long established, and is increasingly so in developing States, which are served by the World Bank Group. Indeed the Bank has actively promoted this expansion despite the widespread negative experiences of indigenous peoples affected by EI projects. It is predicted that "the majority of current big mines, and those planned for the next fifteen years, are located on Indigenous territory - where the human and environmental consequences of mining are usually much more serious than in established extractive zones. . ." <sup>217</sup>

Given the sustained negative experiences of many Indigenous Peoples at the hands of extractive sector projects, a key question considered herein is whether it is appropriate for the Bank to have financed and promoted Extractive Industries (EI) development on indigenous lands. Particularly, where, as is common, the basic rights of indigenous peoples to control the development of their lands and culture are denied. Additionally evidence suggests that even where legal frameworks have been established with the stated objective of improving the protection of affected communities' rights this may not in practice improve the situation adequately, if at all. While Indigenous rights are gaining increased recognition within some nations and the international community this is not yet adequately represented in the practices of mining companies or even in the guidelines of the industry or IFIs including the World Bank. Indigenous Peoples do find ways, however, to effectively assert their rights and aspirations. In the process they have become a major factor in decisions concerning the development of EI projects.

A common understanding of the nature of past experiences of indigenous peoples and other local communities affected by EI projects is essential to the aim of this review. This should provide the context for the assessment of any current or future prospects for EI investment. It is important to recognise however that, as a result of past experience, there is a very low level of trust in communities concerning industry claims of community benefits or environmental protection. At the very least it is clear that any such claims of benefit cannot, as is too often current practice, be assumed.

The history of the expansion of the EI around the world is inextricably linked to colonialism and its exploitative processes. It is little surprise therefore that historically indigenous communities, and other affected communities and nations, have suffered invasion of their territories without consultation or consent, and that their cultural practices and indigenous economy have been overwhelmed through militarization, coercion, violent displacement, introduction of disease and the generation of a legacy of lasting environmental degradation. This is a shared global experience.

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<sup>217</sup> Moody, R. 2000 The decade of destruction: How the mining companies betrayed their promised greening. [www.minesandcommunities.org/Company/decade](http://www.minesandcommunities.org/Company/decade).

Accounts indicate that most mining has been suffered by Indigenous Peoples and other affected communities as a form of “development aggression”. EI projects have in some cases, according to accounts from all regions, caused impoverishment, environmental degradation, cultural disintegration and other physically and socially negative effects. Some of these cases are extremely grave in their destructive impact. Researchers have particularly pointed to the heightened severity of the intrusion of EI projects where indigenous communities subsisting off the land are involved. The reduction of land access and the degradation of land and water resources that inevitably accompanies an EI project can impoverish both materially and culturally. The relationship between the Extractive Industries and Indigenous Peoples is therefore viewed by the affected peoples primarily as a matter of human rights and their abuse. This explains the primacy of their sustained demand for the recognition and respect for their collective and individual rights.<sup>218</sup>

There have even been attempts by some companies and institutions to interfere politically and through the courts to thwart or hold back emerging recognition of indigenous rights including land rights. This inevitably has engendered hostility and mistrust. One of the most notorious historical examples of such obstructive approaches being the efforts of Australian Mining Industry Council spearheaded by the Western Mining Company’s CEO Hugh Morgan, through the so-called media misinformation “black hands campaign” of 1984, to portray recognition of indigenous rights as a threat to the State and its development.<sup>219</sup> Examples of such subversive efforts by mining industry interests continue. The legal challenge to the Indigenous Peoples Rights Act in the Philippines is another example. In Indonesia, mining interests have exerted pressures resulting in the breach of former prohibitions on mining in protected areas.<sup>220</sup> In a number of cases including around the Yanacocha mine in Peru, investors and even sections of the Bank have sought to deny the presence of Indigenous Peoples despite local peoples self identification as Indigenous Peoples.<sup>221</sup> This denial seems motivated by the desire to avoid the extra scrutiny and safeguards this identification might require.

Within the mining industry there is a growing recognition of the need to acknowledge the existence of shameful incidents of past abuse of community rights and environmental values. Sir Robert Wilson Chair of Rio Tinto has urged others in the industry to “accept that [the industry leaders] have made mistakes and to actively engage with, and listen to [their] critics...”<sup>222</sup> Leon Davies, a former CEO of Rio Tinto, has also gone on record to acknowledge specifically the mistakes that his company made which generated the environmental destruction and civil conflict resulting from the operations of the Panguna mine on the island of Bougainville. Some companies, including Rio Tinto, have been active more recently in initiatives that are seeking a new image and improved community relations for the mining industry. Some leading Oil companies have also launched similar initiatives. Companies are however not the only factor.

Some States, according to Indigenous reports to the UN Working Group on Indigenous Populations, have been complicit in such abusive approaches, and even promote mineral

<sup>218</sup> See for example ‘Conclusions and Recommendations’ of the Workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights, UNHCHR, Geneva, December 2001.

<sup>219</sup> Lozano, J. 1997. Mining Act beckons Foreign Firms. *Philippine Daily Inquirer*, May 8, 1997 and Lozano, J. Taking the Last Stand.) <http://humanrights.uchicago.edu/joeylozano/joey03.html>

<sup>220</sup> *Jakarta Post*, February 13, 2003, “Legislators allow exploration in protected forests”.

<sup>221</sup> Project Underground, 2002, *The Path of Least Resistance: An Assessment of the Compliance Advisor Ombudsman’s Handling of the Minera Yanacocha Complaint*.

<sup>222</sup> Wilson, R. 2001. How the world mining industry had to dig itself out of a hole. *The Observer*, July 8 2001 <http://www.observer.co.uk/Print/0,3858,4217851.00.html>

development within ancestral land. Indeed, some indigenous organisations have accused States of consciously prioritising natural resource extraction in indigenous areas over other areas as part of a policy of discrimination against indigenous peoples.

The conflict between States' obligations to respect basic Indigenous Peoples' human rights under international law, and their aspiration to proceed with projects promising national economic benefits, which are thought to require sacrifice in and around the project site, is a fundamental problem for the World Bank. While the Bank is required to respect international law, it is the representatives of States that both govern the Bank and are the major recipients of its loans, and thus wield substantial power over its investments. Currently, states who deny or fail to fully respect the rights of indigenous peoples remain acceptable recipients of Bank loans. States are frequently major beneficiaries of mining investment, and even operate as shareholding partners in mining projects that have adverse impacts on indigenous peoples. They also receive income from imposed taxes and duties, and therefore may be reticent to respect international law obligations that might affect revenue flows. This conflicting role of the State as both beneficiary and regulator of World Bank funding, is perceived as a serious flaw by indigenous communities who experience that Governments holding shares in mines make poor regulators and poor prosecutors of infractions by the companies. (See for example Omai Guyana Box)

*Lack of Trust:*

The past experience of limitations, failures and abuse has bred a deep mistrust of mining companies and, by extension, their financiers. Combined with the magnitude of the potential impacts, this mistrust is the basis of the widely articulated demand for tighter legally binding regulation of mining operations supported by effective independent monitoring and enforcement.

Affected communities, including indigenous groups assert that abuse has been, and remains, the norm rather than the exception. The Philippine Mining Code for example offers nominal legal protections for Indigenous Peoples, including the right to free prior informed consent (FPIC) to any and all development on indigenous lands. Nonetheless, reports from communities (see for example Philippine case study) reveal that in virtually all cases where companies' assert having secured FPIC, such claims are in effect fraudulent and acquired by misrepresentation, bribery, fraud or coercion, even where these assertions are endorsed by government agencies<sup>223</sup>. It is most disturbing to note this conflict of claims extends even to the case of the community of Didipio where the IFC consultant endorsed the company's version of a satisfactory consultation (see Philippine case study):

*In approving the plan, the IFC consultant stated that the acceptance by the host community of the development plan represented the best case of prior informed consent he had ever witnessed.*<sup>224</sup>

despite vehement denials by the affected community.<sup>225</sup>

Many NGOs and IPOs call upon the EIR to recommend a halt to Bank funding and support for mining, oil, and gas projects. As a minimum prior condition, they seek a rights regime that promises, and delivers, protection of international human rights standards that ensure sufficient control of indigenous communities over the development of their land. This further requires any such development to be consensual, beneficial and based on informed processes free from

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<sup>223</sup> Proceedings of the National Conference on Mining May 2002, Tebtebba Foundation,

<sup>224</sup> [www.Didipio.com](http://www.Didipio.com) website

<sup>225</sup> MacDonald, I. 2002. Didipio Case Report. Community Aid Abroad, Mining Ombudsman Investigation.

duress. It is difficult to identify regimes where this is currently the case, hence the widespread call for a moratorium on the development of new mining projects as manifest in numerous conference resolutions.<sup>226</sup>

*The World Bank and Mining*

The Bank has a long involvement in extractive industry projects, dating back more than 40 years. Between 1955 and 1990, the Bank financed nearly 50 mining or mineral processing projects, granting loans and credits totalling nearly US\$2 billion, of which nine (around 20%) were disbursed in the period 1988-1990 alone. These disbursements covered five areas: mining sector reform and rehabilitation; new “greenfield” mine construction; mineral processing; technical assistance; and engineering work.

Bank involvement has grown in more recent years<sup>227</sup>. Bank spending on EI projects in the last 5 years alone has been in excess of US \$5 billion. Through time Bank-supported projects have included a disturbing stream of those failing to operate to safe standards and have been the subject of protest and complaint from affected communities. Increasingly, projects are delayed or prevented by such protests. Allegations of abuses are also increasingly finding their way to court as “victims” of mining projects seek redress from companies and even from the Bank.

*Policy reform, technical funds and dialogue:*

Traditionally project finance has been the main focus of Bank activities. Since the late 1980's however, the Bank has chiefly emphasised, and exerted its greatest influence in, financing policy “reform”, through liberalisation of regulations concerning mining investment, promotion of dialogue initiatives, and generation of guidelines. In 1988 the Bank's Mining Unit conducted a survey of opinions of multinational mining companies. Forty five companies (with combined mineral sales of US\$ 40 billion that year) informed the Bank of their requirements regarding the future behaviour of selected specific countries. They demanded “higher rates of return than in developed countries”, expressed a “strong preference” for the “stable environment of countries with proven track records”, and required “payback” (i.e. rate of return, or IRR) of between 20% and 25% over 24 years. Such demands partially explain the heavy dependence of companies on precious gems and gold projects in their overseas exploration activities. In contrast they willingly accepted IRR of only 13% to 17% in industrialised countries, with a payback of up to six years. The perceived risks of asset appropriation, adverse exchange fluctuations, community disruptions and general conflict allegedly accounted for this discrepancy between developing and developed countries<sup>228</sup>

Although Chile, Botswana and Papua New Guinea were at the time reckoned to be the most attractive countries for mineral investment, this was not particularly because they offered better entry conditions than others. Indeed, as the Bank pointed out, these three favoured countries had, at the time, relatively high tax rates once mining was underway<sup>229</sup>. More important was a state's

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<sup>226</sup> See for example India, National Convention on Communities Command over Natural Resources, Anandwan, 2001: <http://www.mmpindia.org/nc2001.htm>

Indonesia, Manado International Conference on STD:

[http://www.moles.org/ProjectUnderground/drillbits/6\\_04/3.html](http://www.moles.org/ProjectUnderground/drillbits/6_04/3.html)

Philippines: the Declaration of the International Indigenous Youth Conference held in Baguio: [http://www.ayn.ca/news/0208/declaration\\_iivc.htm](http://www.ayn.ca/news/0208/declaration_iivc.htm)

<sup>227</sup> Joint OED/OEG Evaluation of World Bank Group Activities in the Extractive Industries Sector Approach Paper, 2001. The World Bank Group.

<sup>228</sup> [ibid page 44].

<sup>229</sup> [ibid page 45]

financial and political stability, while “mandatory majority local participation, either public or private” carried a strong negative rating.<sup>230</sup>

The canvassed companies gave “greatest importance” to the Bank’s “work with individual countries to update and reform [existing] mining investment codes” which would open prospective regions to exploration, guarantee security of investment, and introduce generous tax holidays to protect the early years of exploitation. Addressing other problems identified by the industry, the Bank placed importance on job cuts and restriction of workers’ rights:

*“allow[ing] for the reduction of personnel, and even mine closure in response to economic reasons [sic] , and to regulate the right of strike in order to avoid unnecessary conflicts where confrontations could be avoided”.*<sup>231</sup>

It is important to note that while the Bank actively solicited the wishes of mining companies and acted strongly in support of the emerging demands, no similar consultation with indigenous peoples, or other directly affected “victims/beneficiaries” of mining, was realised at this time or later. In 1991, the World Bank set out its table, based on these industry demands, justifying finance for the mining sector. Public sector reform, under which state companies would be subjected to “market discipline”, alongside the encouragement of investment in exploration and development by “qualified firms”<sup>232</sup>, was to become the order of the day. The Bank pledged to work to streamline investment legislation, foreign exchange regulations, taxation and labour legislation in mining-dependent countries of the South, and “improve” mining codes “where issues refer to the access by the investors to mining rights, the politics (sic) with respect to mining rights and the role and scope of the state owned enterprises”.

It is clear that the Bank’s role in this area of policy reform has been hugely influential. The Mining Codes of more than 70 countries<sup>233</sup> have been changed within the last 20 years, in line with a package of recommendations from the Bank. Some have responded to the atmosphere of competitive reform even without significant financial intervention by the Bank. The thrust of Bank policy in this area has even provided direction to the policies of other institutions, including the overseas aid agencies of countries such as Canada where mining has a strong base, the regional development Banks, and other UN agencies including UNDP.

While project finance now requires consultations with communities and affected Peoples, under the World Bank policies OD 4.20 on Indigenous Peoples, OD 4.12 on Involuntary Resettlement, and OP 4.36 on Forestry, these are not required for structural adjustment loans, nor for the influence exerted through the conduct of trainings and seminars, policy dialogue and the placement of consultants that have in practice been major vehicles of “reforms”. Reform measures including influence to liberalise mining codes are however potentially more far-reaching in their effect than project financing, yet these reform interventions do not appear in practice to be scrutinised with regards to the WBG safeguard policies framework.

#### *Ecuador: undermining protected areas*

In Ecuador, the Mining Development and Environmental Control Technical Assistance Project, PRODEMINCA, was approved in 1993. It funded a project for the prospecting, surveying and mapping of mineral wealth within the Cotacachi-Coyapas Ecological Reserve. This project was

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<sup>230</sup> [ibid p. 45.]

<sup>231</sup> [ibid page 47].

<sup>232</sup> [op cit page 43]

<sup>233</sup> Colchester M et al. , 2000, *Undermining the Forests*. Forest Peoples Programme, WRM, PIPLinks, Moreton-in-Marsh. p. 20.

criticised<sup>234</sup> as, according to a local NGO - DECOIN, the project would disturb traditional agricultural activities as well as some of the world's most critical and endangered habitat regions. DECOIN filed an official complaint with the World Bank's Inspection Panel, maintaining that the Bank violated its policies on environmental assessment, wildlands, projects supervision and indigenous peoples.

Despite the content of the complaint, the Inspection Panel Report did not analyse the impacts on local communities or Indigenous Peoples. It did however find that the Bank was in relative compliance with its policies on wildlands and supervision, whilst identifying severe flaws in its environmental assessment, including the inadequacy of consultation. It was concluded that although mapping and surveys are not environmentally destructive actions per se, they can be means to a destructive end. The World Bank argued that such surveys would have no environmental consequence since Ecuadorian law prohibits extractive activities in protected areas.

This defence was effectively undermined when Article 27 of the law prohibiting mining in protected areas was repealed during the Bank project's operation. According to the Inspection Panel, no link between PRODEMINCA and this change were found. Affected groups claim the Bank financed a project which increased the threat to protected areas and to the subsistence base of indigenous communities. The Bank claim was that the mineral survey did not imply mineral development. However in a developing country with limited resources it is difficult to comprehend how the academic survey of mineral wealth, without an intention to exploit such wealth, could be defined as a priority for financing over other potential sources of investment. Indeed the President of the IBRD had written earlier that "The two major objectives of the project are: (a) attract new private mining investment and support the systematic development of increased, yet environmentally sound mineral production; and (b) arrest mining related environmental degradation and mitigate the damage that results from the use of primitive and inadequate technology by informal miners."

Many other countries<sup>235</sup> have received some form of advice, technical or structural support, or pressure originating from the World Bank, recommending the liberalisation of mining, petroleum and gas laws.

These revisions in mining codes can and do clash with recent constitutional provisions for the safeguard of land tenure and ownership rights – which are fundamental to Indigenous Peoples. Law reforms relating to mineral development have been identified by indigenous groups as among the gravest current threats to their lives and culture.<sup>236</sup>

In Peru, the reforms have been the basis of the creation of new governmental structures set up to deal with environmental assessments and indigenous peoples<sup>237</sup>. In practice these will most probably merely provide increased opportunities for fixers and middlemen to take advantage of their specialist knowledge of a rapid and complex process. Of general concern arising from the

<sup>234</sup> Zorilla, C. 2002 *Minería, Biodiversidad y el Banco Mundial en Ecuador: El Caso del Proyecto Prodeminca*. Presentation to the Regional Workshop, Latin America and the Caribbean, Extractive Industries Review.

<sup>235</sup> 42 directly linked projects around the world

<sup>236</sup> see for example Philippines: the declaration of the International indigenous Youth Conference held in Baguio, May 2002: [http://www.ayn.ca/news/0208/declaration\\_iyvc.htm](http://www.ayn.ca/news/0208/declaration_iyvc.htm)

<sup>237</sup> Barrera-Hernández, L.K., 2002. The Legal Framework for Indigenous Peoples' and Other Public's Participation in Latin America: The Cases of Argentina, Colombia, and Peru. Pages 589-628 in *Human rights in natural resource development : public participation in the sustainable development of mining and energy resources*. Oxford : Oxford University Press, 2002.

specific Peruvian experience is that the new minerals related laws and the new constitution in Peru have no mechanism for respecting the rights and wishes of indigenous peoples who are in voluntary isolation, i.e. those peoples who choose not to interact with the State or other agencies. These groups are effectively denied the political space within the country's legal framework to choose isolation. This problem is exemplified by the situation in the Nahua/Kugapakori state reserve, where Pluspetrol, an Argentinean oil company is drilling for gas with the aim of constructing a pipeline to the ocean, on the reserve lands of the Nahua, the Kugapori (otherwise known as the Nanti) and the Matsigenka, who are only in the incipient stages of direct interaction with national society.

This situation has brought to light significant problems regarding the interpretation of the notion of community consultation and free prior and informed consent. Companies have been allowed to interpret non-participation in consultation as acquiescence and therefore consent rather than rejection. This clearly is a perverse and self-serving interpretation of the conscious act of avoidance practiced by these Indigenous groups. This highlights the need for the drafting of comprehensive laws, and Bank procedures and requirements to prevent the continuation of such an inappropriate interpretation. It is one of the recommendations of groups involved in this workshop that a policy of voluntary isolation pursued by a community should clearly be viewed as a rejection of all forms of economic exploitation of natural resources within their area.

It is also clear that for any indigenous community, the decision-making processes require adequate access to information, which, given the predominantly oral nature of most indigenous societies, will and should inevitably require direct participation in public meetings as a minimum basis for claiming social acceptability. The Didipio case also highlights the absence of trust between companies and communities and therefore the need for credible independent monitoring agencies that enjoy the confidence of affected communities.

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*The Philippines: engineering consent:*

The World Bank directly and with and through other agencies including UNDP, and ADB championed reform of mining legislation in the Philippines and the formulation of the mining act of 1995. Philippine government representatives have been prominent participants in numerous international seminars and training programmes. The Philippines' acceptance of the reform package has itself been projected through such meetings. The Philippine Mining Code 1995 closely follows the Bank template (c.f. the Philippines Case Study). The Bank also chose to project Western Mining Company (WMC) as a best practice company for their approach to investment in the Philippines WMC was, at the time, a major backer, and the first beneficiary, of the mining code and was actively involved in its formulation.<sup>238</sup>

When enacted, the law was described by the Mining Journal as "*among the most favourable to mining companies anywhere*". Applications for exploration flooded the Mining Department<sup>239</sup>. This rapid expansion of mining was and remains opposed by Indigenous Peoples all across the Philippines, who based their negative response on past experience.

Mining has a long history in the Philippines, particularly in the Cordillera region, which is also the ancestral land of the largest concentration of indigenous peoples in the country. Mining companies have operated on Igorot lands for 100 years. They have dispossessed indigenous peoples not only of their mineral wealth (some Igorots are traditionally miners) but through

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<sup>238</sup> In 1993 WMC assisted the Philippine government in conducting a workshop at the annual Asian mining congress where companies were invited to join in the drafting of the revised mining code.

<sup>239</sup> Tujan, A. Guzman. R 1998, Globalizing Philippine Mining, Ibon Books, Manila.)

mineral claims even of their surface rights to land and livelihood. No mine site in the region has been adequately restored and every mine in the region has experienced at least one serious tailings dam breach. The majority of these tailings dams have collapsed with catastrophic impacts downstream. Mining has seriously degraded the quality of all the major rivers flowing out of the Cordillera mining districts.

This negative analysis of the Philippine mining industry is shared even by industry and government consultants. Dr Allen Clark of the East West Centre in Hawaii observed, in a 1994 Asian Development Bank commissioned report, “We have never seen a mining industry with a poorer environmental record.”<sup>240</sup>

Legal provisions have been developed in the Philippines for the protection of indigenous rights in decisions about mineral development within ancestral lands. These are contained both in the Indigenous Peoples Rights Act 1997 (IPRA) and the 1995 Mining Code. The framework of these laws could and should have provided a significant protection for the rights of Indigenous Peoples. However in practice according to numerous accounts<sup>241</sup> these provisions have been honoured more in the breach than the observance. Substantiated accounts of breach of the provisions of IPRA and the Mining Code in relation to FPIC and or other important issues come from many areas.

The decisions allowing or rejecting mining are momentous ones which require communities to be fully informed, well advised and possess sufficient time to conduct their own decision making process. The implementing practice of the Mining Code and the IPRA is currently not allowing this. Implementing rules and regulations of the IPRA law have been repeatedly changed, following mining industry pressure, to further deprive communities of effective means of legally defending their rights. The time for lodging appeals has been reduced while no improvements have been made in transparency to allow communities to ascertain company claims regarding the achievement of FPIC. One unintended consequence of improvement of legislation concerning the protection of the rights of indigenous peoples is that new and sometimes illegal and coercive pressures are being applied to indigenous communities to secure by all means their “consent”

Different communities report militarization of isolated communities as a recurring element in engineering consent. There is grave concern at the conscious and successful effort of mining companies to introduce factionalism, divide communities and promote individuals who may have no traditional authority as leaders to represent the presence of FPIC where it does not exist. Reports suggest traditional leaders may be ignored or displaced where they oppose mining. Communities report the widespread use of bribes and gifts and unregulated and questionable patronage by companies over prominent individuals/decision-makers within their communities. Practices that, if applied to a local government official, might constitute an offence against graft and corruption laws are openly practiced to traditional leaders and others. The repeated accounts of collaboration by representatives of government agencies in such processes are particularly disturbing.

There is therefore a widespread scepticism in the processes of the 1995 Mining Code. Its repeal has been called for by the Catholic Bishops Conference of the Philippines, the National Council of Churches of the Philippines, the Dapitan Initiative, and the National Mining Consultation, Baguio 2003.

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<sup>240</sup> Clark, A.L., 1994, The Philippine Mineral Sector to 2010: Policy and Recommendations, Report to the *Asian Development Bank* on T.A. No. 1894-PHI, East-West Center, Honolulu, Hawaii, 360p.

<sup>241</sup> Proceedings of the Philippine National Conference on Mining May 6-8 2002 Baguio City, 2002 Tebtebba Foundation

Mining conflicts have already led to acts of civil disobedience, protest and violence. Legitimate protests have been branded subversive and mining sites increasingly maintained by militarization. Every indication is that mining related conflict is on the rise, and it seems inevitable that indigenous peoples will be the victims.

These experiences reveal that even where legislation exists nominally to protect indigenous rights, and even where Bank identified “best practice” companies operate, we still cannot assume effective implementation or adequate safeguards. Without effective credible independent monitoring, abuses may reasonably be assumed to continue.

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*Papua New Guinea: low standards and development failures*

Papua New Guinea is a country in which the Bank has invested. PNG combines an extremely rich mineral endowment with massive developmental needs. It is generally acknowledged that Bank influence in the country is substantial. Technical assistance for the reform of the extractive sector has been a major form of World Bank investment for Papua New Guinea for the past two decades. The Petroleum Exploration Technical Assistance Project (1982), the Petroleum Exploration and Development Technical Assistance Project (1983), the Gas Development and Utilisation Technical Assistance Project (2000), and the Mining Sector Institutional Strengthening Technical Assistance Project (2000) were all generally geared towards increasing private sector investment in extractive operations and increasing government capacity to encourage this investment and monitor it.

Most of these projects have been classified under environmental categories C or B, which do not require environmental impact assessments, and do not trigger the scrutiny of the safeguard measures.

Research, including the OED report for this EI review, show that EI projects, while generating income for companies and central government (in 2001, the extractive sector accounted for two thirds of total exports), have mostly failed to reach the communities in improved services or benefits<sup>242</sup>. Indeed the extremely high externalised costs of mining in PNG leave a heavy burden on the mines affected regions and Peoples. The World Bank’s own OED report for the EI Review identifies this PNG experience as illustrative of the reality that good governance is an essential prerequisite of positive outcomes for Bank projects.

In PNG, some environmental standards for mine operations are shamefully deficient, and despite the substantial influence of the Bank, are below international best practice in important areas. Indeed in relation to mine waste management PNG, supported by the Bank, allows the controversial practice of submarine tailings disposal, which is currently barred in the USA, Canada and Australia. In the case of the Lihir mine, supported by MIGA, STD is being applied on a small island where its impacts are, as a consequence, likely to be more severe for the local population in impacts on fisheries, coastal impacts, and health. The practice of direct dumping of mine waste into rivers is practiced by major international companies in PNG but not in their operations elsewhere. The impact of this on the river and marine environment has been severe.

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<sup>242</sup> OED, 2003. Evaluation of the World Bank Group’s Activities in the Extractive Industries: Background Paper on Factoring in Governance. Operations Evaluation Department.

### **New Technology brings heightened misery<sup>243</sup>**

During the 1990s, Benguet Corporation, the Philippines oldest mining company, developed an open pit mine at the site of their former underground operation at Antamok Itogon within Ibaloi ancestral lands. They destroyed the community of Antamok with its school, clinic, and churches, to make way for the open pit, they also mined lands including indigenous burial sites, water sources, traditional settlements, and farms amongst others. The area has been severely depopulated as a consequence. The company incorporated in their operations the traditional surface ore deposits previously worked by indigenous miners. As a result of the shift to open pit mining they reduced their workforce from more than 6000 in the 1970s to less than 600 working the open pit and processing plant. The ore deposit, which had been worked by indigenous miners for at least 1000 years and by the company continuously for more than 80 years, was by open pit methods worked out and closed within 7 years, finally closing in 1997, with a loss of all remaining jobs save a skeleton security staff. In the same period a large proportion of the 20000-24000 Igorot peoples in the area, engaged in or dependent upon small scale mining, had their livelihoods abruptly terminated by the expansion of company mining. An area noted for its prosperity and stable indigenous communities has become another area of hardship and out migration.

This area has seen no effective restoration, and the Antamok mine site is still bare and dusty. The run-off of silt and heavy metal rich material into the Itogon River continues. A cyanide rich tailings pond, which was constructed adjacent to the pre-existing indigenous community of Loakan, lingers as a health and environmental hazard. The fumes from the pond pervade the air. The company continues to exercise its "rights" over the land, which has not been and, according to the company will not be restored to its original indigenous owners.

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### *"Best Practice" from "Bad actors"*

Despite the widespread clamour for strict regulation of the extractive industries, the World Bank has, in the EI sector, focused its efforts on various non binding efforts to promote "best practice". The Bank has chosen to do this by the projection of certain leading companies. It has partnered their initiatives and funded their projects. In mineral extraction however, many companies, and many projects have been accused of serious violations of rights. A problem therefore has been finding companies whose own record is adequate to the exposure.

### **WMC and Best Practice**

The Bank chose to highlight Western Mining Company (WMC) as a best practitioner, specifically in relation to the Tampakan project in the Philippines, because of the company's stated commitment and structural efforts, i.e. the formation of an indigenous peoples department, and the development of an Indigenous Peoples Plan within the Tampakan project. The company emphasised its approach to indigenous issues at Tampakan as being the project on which it sought to be judged. WMC did make efforts to inform and negotiate with communities, organised exposures to other mines, and entered agreements with tribal leaders, amongst other activities. However welcome these developments might seem on paper the promotion of WMC as a best practitioner was unacceptable to many, both historically and for its actual practice in Tampakan.

In the past, Hugh Morgan, CEO of WMC, has been one of the most vociferous critics of environmentalists and indigenous rights campaigners. The involvement of Morgan and WMC in the racist "Black Hands campaign" was unforgettable and unforgivable to many indigenous

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<sup>243</sup> "The Land is Ours", 1997, Stanford, Oxfordshire., Cordillera Links Briefing No1. Additional materials from Cordillera Peoples Alliance and Itogon Inter-Barangay Alliance.

rights campaigners. The company also continues to have serious unresolved issues in relation to projects on Indigenous lands particularly in South Australia. The practice of WMC within the Tampakan project has also been both well documented<sup>244</sup> and the subject of severe criticism both from local organisations and development agencies and church groups in the Philippines and Australia. WMC stand accused of dividing communities against themselves, making payments to leaders to secure their support, giving gifts and organising junkets for indigenous leaders/decision makers in order to influence their decisions including outings to night clubs and bars away from the community, and along with government agencies rushing indigenous leaders into signing agreements without adequate preparation or understanding (too short notice, inadequate consultation, failure to explain the full complexity of the agreements, absence of legal advice, version only presented in English.) According to Muntz, the Tribal Principal Agreements in particular contained a gross imbalance of benefit for the company:

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*The fundamental issue with these Tribal Principal Agreements (TPAs) was the unequal nature of the commitments involved by each party. They committed the communities **irrevocably** to allow mining on their land for the duration of the process, from exploration to mining to rehabilitation of the mine site at the end. In return the agreements required the company to make various financial commitments to community development programs in the tribal communities, but left it with **absolute discretion** about almost everything else. The company had achieved what every business craves, total certainty over at least one aspect of its operation. But the communities gained no certainty whatsoever about any of the crucial social and environmental parameters of mining, only the financial compensation for mining damage, and the royalties from it.*<sup>245</sup>

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Despite its efforts, WMC failed to secure the support of many in the local communities. Eventually WMC withdrew from the project. However despite WMC's stated commitment to "best practice" at Tampakan, in the face of sustained opposition they sold their rights to other mining interests. This left the local B'laan peoples with a deep uncertainty over commitments entered into by WMC.

The perpetrator of the destructive and irresponsible mine waste management system at the notorious Ok Tedi mine in PNG was BHP, now BHPBilliton, the world's largest mining company. In the case of Ok Tedi the damage to the river and environment has already had a direct negative impact on the subsistence activities, livelihood and health of people living along the Fly River. Further, the silt, acid and heavy metals build up from the tailings deposited in the Ok Tedi and Fly rivers has resulted in the severe reduction of river life and biodiversity and in the back of forest cover. This condition is still deteriorating and it is predicted to continue to do so for many years to come.<sup>246</sup> Community representatives have filed legal cases against BHP (now BHPB), which was the main owner and operator of Ok Tedi, in an attempt to force the company to acknowledge liability. In efforts to prevent local ancestral land holders from pursuing their case against BHP in the Australian courts, the company engaged in interference in the political process in PNG. Following initial denial, BHP was forced to confess that it had helped draft a PNG law seeking to outlaw the legal process followed by the landholders. The purpose was clearly to silence the landholders and prevent their case coming to court. This strategy failed when the Australian court ruled the company in contempt when their involvement

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<sup>244</sup> see for example, Muntz, B., 2001, Mining And Community Rights - A Case Study: WMC Resources Ltd. and the Tampakan Copper Project WMC Resources Ltd. and the Tampakan Copper Project, Community Aid Abroad

<sup>245</sup> Ibid.

<sup>246</sup> Kirsch, S., 2001 "mining, indigenous peoples and human rights: a case study of ok tedi," Paper presented to the Workshop 'Indigenous peoples, private sector natural resource, energy and mining companies and human rights' organised by the UNHCHR, Palais des Nations, Geneva December 2001.

in this skulduggery was revealed. The company was eventually forced to enter an out of court settlement promising to pay damages and undertake management improvements. In practice the company has so far failed to honour the settlement and the ancestral land-holders have returned to court. Meanwhile BHPB have exited the project after first pressuring local people and the Government to agree to a final settlement package that once again seeks to undermine the ongoing legal action. The deal offers a cheap and finite settlement to a pollution problem that is currently continuing to expand and whose final costs are likely to be many times more.<sup>247</sup>

BHPBilliton have therefore, at Ok Tedi and other projects (see box on IFC and BHPBilliton in Botswana), a track record of environmental and social failures, deviousness, and manipulation yet the Bank continues to cooperate with the company and finance its projects.

Substantiated cases of environmental or social abuses have been cited against many other companies that still are seen as acceptable partners by the Bank. In the case of AMF the company was indicted by a UN panel of experts into illegal activities in the Congo shortly before it became an IFC partner (see box: The UN indicts)

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#### **The UN indicts while the IFC invites:**

In February 2003, America Mineral Fields Inc (AMF) signed an agreement with the IFC and South Africa's Industrial Development Corporation to participate in a new copper-cobalt tailings treatment scheme at Kolwezi in the Democratic Republic of Congo (DRC), formerly operated by the state mining company, Gecamines. The agreement includes the right of IFC to buy equity in AMF.<sup>248</sup>

AMF and its founder, and chief shareholder, Jean-Raymond Boulle, are notorious. As bloody conflict over resources raged in Zaire during the nineties, AMF became the chief vehicle by which Boulle expanded into Africa. Boulle has been described, as "a man who can manoeuvre as a privileged and powerful player in several regions and markets. In environments of chaos, state collapse and economic decay, a powerful private player with access to significant amounts of money, raw materials, military technology and even a private rapid reaction force, can deviously pursue his own private agenda."<sup>249</sup> Jean-Raymond Boulle has now obtained control of a substantial portion of DRC's strategic minerals. Boulle first acquired the valuable Kolwezi workings five years ago, in return for loaning then-rebel leader Kabila his private jet and donating US\$1 billion to Kabila's anti-Mobutu campaign.<sup>250</sup>

Now registered in London, AMF started life as a petroleum company in 1979. From 1995, under Boulle, it expanded in Africa, in DRC, Zambia and Angola. Boulle had been De Beer's "diamond czar" in the Congo/Zairean capital, Kinshasha, when the country was in fief to Mobutu.<sup>251</sup> AMF has been accused by authoritative researchers of having been linked in the recent past with IDAS (International Defence and Security), a spin-off of the notorious Executive Outcomes mercenary force, and the British-based Defence Systems Ltd, another band of paramilitaries active in securing mineral resources in conflict areas, also based in London.<sup>252</sup> IFC is now supporting AMF in the DRC. Astonishingly, their deal followed shortly after the indictment of AMF (along with several other companies) by a UN panel of experts inquiring into illegal activities in the Democratic Republic of Congo: the company was accused of violating the OECD Guidelines for Multinational Enterprises.<sup>253</sup>

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<sup>247</sup> Kirsch, S., 2002, *Litigating Ok Tedi (Again)*, 2002, in *Cultural Survival Quarterly*, Boston.

<sup>248</sup> [Mining Journal 21/2/03].

<sup>249</sup> [Johan Peleman, "Mining for Serious Trouble: Jean-Raymond Boulle and his Corporate Empire Project in "Mercenaries" An African Security Dilemma, Pluto Press, 2000: 165-166].

<sup>250</sup> [Pratap Chatterjee Mercenary Armies and mineral wealth, *Covert Action Quarterly*, number 62, Washington, Fall 1997, page 36].

<sup>251</sup> [Roger Moody *Out of Africa: mining in the Congo basin in IUCN The Congo Basin/le bassin du Congo*, Amsterdam 1998, page 137].

<sup>252</sup> [(Eds) Abdel -Fatau Musah and J Kayode Fayemi *Mercenaries: an African Security Dilemma*, Pluto Press, 2000, page 69].

<sup>253</sup> Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR CongoS/2002/1146 [Mining Journal 25/10/2003, MJ 8/11/2002].

The wilful breach of existing standards and even legal requirements perpetrated by a range of companies argues that good faith or best practice cannot be presumed even from leading EI companies. Where mines exist there is the need for independent, adequately resourced, rigorous and frequent monitoring of mines and mining company activities to safeguard the interests of affected communities and the wider society, if only for the reason that the consequences of failures in EI projects can be so serious. Much evidence reveals that where indigenous rights are not adequately protected in law and practice then abuses by companies tend to continue to occur.

*Dialogue, Conciliation:*

The Bank has been subject to strong criticism particularly from Indigenous Peoples and organisations for its sustained support for unacceptable mining projects. So far the Bank response, rather than concentrate on the specific concerns and wishes of affected communities, has instead developed general programmes like Business Partners for Development that has failed even within its own terms.<sup>254</sup> BPD was to be a multi stakeholder initiative to seek to explore new means to resolve disputes. The BPD had an Extractive Industries sector within it. Yet in practice even the claims of multistakeholder participation are rather threadbare. An assessment of the EI cluster project reports that only one Government (the United Kingdom) and one NGO (CARE International) participated. The companies involved expressed disappointment that BPD was not able to address their central concerns. BPD made attempted interventions in several projects including the Kelian mine run by Rio Tinto in Indonesian Kalimantan and which was a place of conflict and protest by Indigenous Peoples throughout the 1990s. (See Indonesia Case study)

The Bank has also responded to critics by developing the Compliance Advisor Ombudsman (CAO) and the Inspection Panel mechanisms. While these mechanisms offer the prospect of recognising and investigating complaints there has been strong criticism that even here the emphasis is on conciliation and amelioration whatever the nature of the complaint (see Box: The Yanacocha Gold Mine and the CAO of the IFC).

The Bank has prepared documents, videos and also organised seminars, including in Quito and Madang on the subject of "Mining and the Community", which have provided a forum for the presentation of Bank ideas and a dialogue among participants on issues of community relations. Such seminars have, as with so many other initiatives, tended to be dominated by participants from the Bank, government departments and mining companies, with the attendance of some NGOs: this was the case for the above, despite their topic being focused upon improving community relations. However communities and indigenous organisations, particularly those in dispute with companies, have been seriously under-represented. Nonetheless publications from such seminars have made some information and opinions more widely available.

*Multi Stakeholder dialogue:*

The Bank is increasingly using multi stakeholder dialogues to address the concerns of its critics. Such efforts abound. The Extractive Industries Review being but one example. However while multistakeholder dialogues are seen to carry a credibility, which is absent from internal review, there is growing concern about the abuse of this credibility resulting in its diminution.

There are, as yet, no standards applied to the adequacy of the participation or quality of access and control within such processes. There are no standards to assure the independence and credibility of the processes. Consequently, even these processes are being discredited by

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<sup>254</sup> Moody.R, 2002, *Partners in Grime: a critique of the bpd natural resources cluster programme* Nostromo Research, London.

overzealous claims or cynical manipulation. The World Commission on Dams (WCD), in which the Bank was involved, set new standards of participation, independence of management and process, and consensual outcomes that might be reasonably assumed to form a minimum for future initiatives. Sadly this has been far from the case. Despite its role in the formation and financing of the WCD, the Bank has failed to respond adequately to its recommendations. The EIR, which originally was characterised by Bank President Wolfensohn to civil society groups as an activity in the mould of WCD, has a significantly different structure. The shortcomings of the structure and process mean it clearly fails to maintain the standards set in the WCD process in governance and process (as elaborated in section 4). This has inevitably affected its credibility and will erode the authority of the conclusions. Civil society groups highlighted these shortcomings at the outset and have reiterated them at every stage<sup>255</sup>.

*Global Mining Initiative/MMSD:*

The Bank has also endorsed other controversial processes that have tended to generate more suspicion than harmony. The Global Mining Initiative, and particularly its Mining, Minerals, and Sustainable Development project, launched by the mining industry is a case in point. This initiative was set up by the industry to address issues seen as critical to its future credibility. As with the EIR, the central question concerned the potential role of mining in sustainable development. Yet the industry unilaterally imposed the definition of problems, the management structure, the selection of a host for the project, even the selection to the MMSD process monitoring committee. The major source of all funding was the industry, which provided \$7 million.

Given the deep suspicion that exists in the sector, generated in part by the industry's regrettable history of one-sided initiatives and self-declared and "self regulated" codes of conduct, such an approach inevitably led to suspicion among civil society groups and indigenous organisations<sup>256</sup>. There is a widespread concern that industry's willingness to sign up to binding agreements on generalised issues concerning improved standards has been more directed at improving the poor image of mining rather than in improvements in on site practice. A number of groups directly involved in mine monitoring wrote early on in the MMSD process to appeal for, among others, a restructuring of MMSD project control and a broadening of its central goal to incorporate the priority concerns of mines affected communities<sup>257</sup>. When this was rejected the majority of civil society groups, indigenous organisations and affected communities who knew of the initiative chose to boycott the process<sup>258</sup>. This has been repeated by some with regard to the EIR process. For most of the period of the MMSD project, the assurance group had no participation from any indigenous representation. Low attendance at indigenous workshops revealed a widespread scepticism. Indigenous organisations who attended one such event also report that they did so only due to misrepresentation. For example, among the indigenous participants in an indigenous workshop concerning the project, some attended unaware of the links to MMSD<sup>259</sup>.

Despite the widespread rejection of MMSD and its commitments to the contrary, the project and the associated Toronto conference "Resourcing the Future" were subsequently represented as a

<sup>255</sup> See for example, Letter to Emil Salim from Civil Society on The Extractive Industries Review's Consultation Process and the Compilation of Consultation Inputs Working Paper, March 2003.

<sup>256</sup> Vicki Tauli-Corpuz & Danny Kennedy, 2002, Native Reluctance to join Mining Industry Initiatives: Activist Perspectives in Mining Indigenous Lands: Can Impacts and Benefits be Reconciled? Special Issue of *Cultural Survival Quarterly* 25(1).

<sup>257</sup> Letter to Luke Danielson and Richard Sandbrook, of MMSD, August 2000, from Desposito, S et al

<sup>258</sup> London Declaration, 2001, May: [www.minesandcommunities.org](http://www.minesandcommunities.org)

<sup>259</sup> private communication from Cordillera Peoples Alliance

credible multi-stakeholder dialogue. The mining industry has been particularly enthusiastic in hailing this failed process as a mandate for their interventions in the WSSD processes.

The World Bank uncritically accepted the legitimacy of the MMSD. It acted as one of the few non-industry sponsors of the project and contributed to its financing. The MMSD and the Bank held joint workshops within the process where the multi-stakeholder claims for the project were uncritically endorsed.

### **Environmental Guidelines**

The World Bank Group has developed and promoted environmental guidelines with the purpose of ensuring adequate safeguards in relation to environmental protection.

These guidelines have also been the subject of criticism. Critics have pointed to the severe damage caused by the environmental impacts of mining and mine related management failures and deficiencies as evidence for the need to both substantially raise environmental safeguard standards in mining and effectively uphold such standards. The Bank therefore has been criticised for pitching its environmental standards too low. In some significant aspects including marine disposal of mine waste, riverine disposal, and minimum standards for tailings dams the Bank has identified standards below those that already apply in active mining economies in the north including the USA and Canada. This has been maintained despite serious negative experience by the Bank of environmental damage caused even within Bank supported projects including the Omai mine in Guyana, Freeport mine in West Papua, Kumtor mine in Kyrgyzstan and Lihir mine in PNG.

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### **Omai: the poisoned chalice**

At close to midnight on August 19th 1995, the tailings dam of the Omai gold mine in Guyana, burst its bounds, propelling around four billion cubic litres of mine effluent into a local creek and then into the country's main waterway, the Essequibo river. What the country's then-president, Cheddi Jagan called "the country's worst environmental disaster" has been the subject of numerous articles and several major reports. The World Bank, through MIGA along with Canada's EDC provided critical political risk insurance covers for the Omai partners, Cambior and Golden Star Resources (both Canadian) and the Guyana government itself.

MIGA dismally failed to properly assess the standards of mine construction. Although the company claimed to have observed North American standards, these were ones set in Quebec rather than higher ones followed in Ontario or by the US EPA. The partners failed to line the tailings dam with HDPE covers and to protect groundwater resources. Worse, they permitted the dam wall to rise far above limits set in the original EIA almost certainly the key factor in ensuring that wastes would overwhelm the dam's capacity to contain them [see report of the tailings commission].

As the scenario for disaster developed during late 1994 and early 1995, several observers pointed out that a collapse was virtually inevitable<sup>260</sup>. There had in fact been three "spills" already over the previous six months, when cyanide poisoned the river's fish. These, combined with an admission by Cambior that the dam was filling to its brink, led Omai to petition the government to be allowed to discharge treated wastes directly into the river. The government refused on environmental grounds, but the mine continued to operate until the dam's collapse in August that year. Throughout this critical period, MIGA failed to monitor mine safety, let alone insist on a precautionary closure of its operations. The United Nations Development Programme (UNDP) concluded that the "baseline and continuous monitoring at Omai have largely been inadequate"

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<sup>260</sup> see Roger Moody "Five minutes to Midnight" Minewatch Briefing, London, 1995.

The mine was allowed to re-open in 1996, albeit with several new technological improvements, but before a parliamentary sub-commission on the disaster had delivered its final report. The World Bank, from its early promotion of Guyana's "structural adjustment" - based inevitably on privatisation - had regarded Omai as a tangible example of the large-scale minerals-related investment which must be imposed upon a highly-indebted country. It was certainly not going to argue that the disaster proved the mine was unacceptable. Indeed, two months after the dam collapse, Gerald T West, MIGA's Senior Advisor for Guarantees, offered his opinion that the damage had been grossly overestimated. According to a Guyanese member of parliament, MIGA told the ensuing Omai inquiry that, if the government imposed any new environmental regulations on the mine, the agency would consider this "tantamount to nationalisation" compelling it to pay compensation to Cambior and Golden Star<sup>261</sup>

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The Bank guidelines therefore are seen as doing insufficient to raise mining environmental safeguards to more acceptable levels.

The worst nightmare faced by any mining company is perhaps for its tailings containment facility to collapse, pouring thousands, if not millions of gallons of cyanide and/or heavy metals - laced sludge into neighbouring streams and rivers. At least one such disaster has occurred each year over the past thirteen years.<sup>262</sup> The industry's International Commission on Metals and Mining (ICMM) points to 1-3 per annum. Among the worst disasters ever to have occurred have been mines supported and assessed by the World Bank .

One problem that derives from the existence of the guidelines but contrary to its stated intentions is the proliferation of claims by companies to be adhering to "Best International standards" represented by the Bank guidelines. Clearly the claim by such companies is misleading since the Bank Guidelines do not currently represent international best practice in certain key respects. Secondly companies who are not funded or scrutinised by the Bank in anyway are increasingly making such claims to add credibility and the seeming authority of Bank backing to their proposed plans. TVI Pacific for example, a company that has met with strong local opposition to its operations from the Subanon people in the Philippines, has announced that it intends to operate to "best International Standards" which it defines itself as compliance with Bank guidelines. The same company has also claimed that it's proposed mine will be but part of a World Bank supported regional development for the area. Despite research efforts it has not been able to verify the validity of these claims. There is no record of the Bank having involvement in this project. It is the consequence of the current Bank approach however that there is no mechanism to regulate or prevent such questionable claims. TVI is a company accused of abuses and environmental mismanagement by the Subanon. Company claims regarding adherence to Bank standards only tend to reflect badly on the Bank. However in the absence of effective monitoring and enforcement such claims are becoming commonplace. Currently no one is in a position to assess their relationship to actual practice and the overall effect is to undermine the credibility of all regulatory frameworks.

#### *The IFC*

The emphasis placed in the Bank on development through privatisation, mobilising private capital for direct investment and expanding the reach of the global economy have all tended to strengthen the relative role of the IFC in project financing. Its pivotal role in the funding of extractive projects has been highly controversial in a number of cases, including the Chad-

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<sup>261</sup> Community Leaders of Riverain Communities Affected by the 1995 Omai Cyanide Spill, Letter to Gerald T West, March 18 2000.

<sup>262</sup> see Roger Moody *Into the Unknown Regions: the hazards of STD, SSC and International Books*, London and Utrecht, 2001, pages 47-51.

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Cameroon Oil Pipeline Project, implemented by ChevronTexaco-ExxonMobil consortium, the Yanacocha Gold Mine in Peru, which is owned by Newmont, and the BP-owned Baku-Ceyhan Oil Pipeline in Georgia and Azerbaijan, and most recently its support for gold mining development in Laos and diamond mining in Botswana. (See Box: IFC and BHPBilliton in Botswana)

The IFC is notorious for long having operated to lower standards of rigour on environmental and social standards than other parts of the Bank. In addition there are instances where the IFC has misclassified projects or misrepresented the local situation to avoid rigorous scrutiny and particularly the application of Bank safeguards. Throughout the Bank it has proved difficult to get any branch of the institution to accept the legitimacy of questions concerning allegations of bad practice in projects it is funding. In the case of IFC it holds significant numbers of shares in some projects and has proved, as a result, to be even more reticent to acknowledge the validity of criticism.

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**Box**

**IFC and BHPBilliton in Botswana**

In its current decision to support the activities of BHPBilliton in Botswana the IFC has broken its own investment criteria. BHPB are seeking to explore for diamonds on San bushman territory. Despite an IFC policy not to fund exploration activity this case has been made an exception. Here as elsewhere (eg Yanacocha) the IFC has unilaterally decided to question the Indigenous status of the affected communities, presumably in a conscious effort to circumvent Bank requirements concerning projects affecting indigenous peoples.

Kalahari Diamonds Ltd is an (as yet) unlisted company, set up only in March 2003 to explore great tracts of Botswana, many of which are traditional lands of the San hunter-gatherer peoples. The company currently has an impressive capital base of more than twenty million dollars (\$US 21 million), raised from a group of influential backers including Antwerp diamond merchants - headed by the world's biggest mining company, BHPBilliton (20%), and the IFC (10%). [Mining Journal 21/3/2003.] The plan is to register the company on London-based AIM (Alternative Investment Market) over the next two-three years.

Although Botswana is the most successful diamond-mining nation on the planet (thanks to extremely high quality output), BHPBilliton will now investigate new diamondiferous kimberlite pipes over no less than 30% of the country's prospective terrain. The Botswana government has the right to buy an interest in any future mine, but BHPB may also buy back up to 60% of Kalahari's interest in any newly-located mineral deposit.

The IFC defends its involvement with KDL as, inter alia, "making [the company] a leader in sustainable mining development initiatives [and] in defining the principles for support and improvement of local communities"<sup>263</sup>

But the IFC also acknowledges that its role "is likely to come under close scrutiny from civil society and the media", since a third of KDL's exploration licences fall within the Central Kalahari Game Reserve, home to the indigenous Gana and Gwj San Bushmen"<sup>264</sup>

Extraordinarily, while identifying the London based Survival International as a vociferous opponent of such exploration the IFC's appraisal mission "did not identify any groups in Botswana opposed to the project or the IFC's involvement".<sup>265</sup> A cursory glance at Survival's website reveals a very different

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<sup>263</sup> [IFC internal document, January 2003, page i].

<sup>264</sup> [ibid page ii].

<sup>265</sup> [ibid page ii; see also ibid page 10].

picture. Not only have several San spokespeople vigorously opposed such trespass on or over their territory; so have Botswanan human rights workers<sup>266</sup>.

It's unusual for the IFC to invest at such an early stage in a mining project and regrettable given the clear local opposition by local people. Apart from profit motive it is difficult to see why the World Bank has entered at this stage. The IFC confesses that its experience in "early entry" mining projects has been "mixed"<sup>267</sup>.

A successful outcome of KDL's exploration would, according to the IFC, bring in new foreign exchange and fiscal receipts for the government, providing an important engine for growth and implicitly a source of financing to support the social sector, especially HIV/AIDS projects, economic diversification infrastructure development and poverty reduction programmes". But much of this contention is both moot and speculative. Botswana has an average growth rate of 7% a year, making it the highest in the developing world<sup>268</sup> as well as high internal liquidity and foreign exchange reserves which will cover another two and a half year of imports<sup>269</sup>.

While Botswana's status as a lower middle-income country could clearly be improved one may wonder why - as the world's biggest diamond producer - profits have failed so far to be better distributed as development benefits among its poorer citizens. Nor is there a compelling reason to jeopardise the precarious livelihoods of its indigenous people, when the existing diamond pipes at Orapa and Jwaneng (itself bringing in annual revenues of US\$1.5 billion) are as the IFC itself agrees - of "exceptional size and host resources that will support mining operations for over 20 [more] years"<sup>270</sup>. In fact, according to the IFC, Janeng is "the most profitable mine anywhere, enjoying production costs lower than 6% of revenue"<sup>271</sup>.

It is difficult to understand how the investment can be prioritised in development terms. BHPBilliton, as the world's largest mining company is one of the last companies on earth actually to need IFC finance. It looks increasingly that the IFC involvement is to provide some credibility to a project already under severe attack for its violation of Indigenous rights and that for IFC the pay off is the speculation that they will hold a share in a major diamond mine and their most profitable investment to date.

The Botswana government's protestations last year that the San had not been removed from the Central Kalahari game reserve (as they were until 2001) in order to facilitate the entry of mining companies, are now looking increasingly threadbare<sup>272</sup>. IFC's spurious contention that, since all Botswanans are "indigenous" the San cannot claim special status, exposes a wilful ignorance among IFC staff and the use of self serving denial of status to indigenous peoples. Despite the IFC denial of the San special status it reports contradictorily that KDL will "ensure that all project affected peoples receive culturally compatible social and economic benefits in compliance with WB OD 4.20 Indigenous Peoples policy"<sup>273</sup>. This misses the central point that at least some San groups do not want the project and certainly oppose removal especially forced removal from their lands. Also, as the Botswana government is accused of forcibly re-settling the San, not to protect their livelihoods but the opposite, there seems no basis for optimistic assumptions of benefit for the affected peoples.

BHPB is faced with a public relations problem. It has involved the IFC in its Botswana adventure on the basis of promises of "sustainable development" initiatives and Impact Benefits Agreement packages introduced at its Ekati mine in Canada. This, even though it had experienced stiff and prolonged opposition from many in the Dene nation; and even though its 1996 compensation agreement with 30,000 villagers affected by its mismanagement of the Ok Tedi gold/copper mine in Papua New Guinea, has still not been properly implemented and is certainly the opposite of sustainable development.

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<sup>266</sup> [Survival International e-news, 20/2/2003].

<sup>267</sup> IFC, 2003 page 8].

<sup>268</sup> [ibid page 2]

<sup>269</sup> [ibid page 3]

<sup>270</sup> [ibid page 3].

<sup>271</sup> [IFC ibid page 13].

<sup>272</sup> [Guardian, London 20/2/2003].

<sup>273</sup> [IFC internal document, page 17-18].

The IFC has long stood by “bad actor” countries as well as companies. It invested in Chile by purchasing equity in the vast Escondida copper mine while the country suffered under the iron fist of was ruled by the Pinochet military regime. Recently (2001) in Laos, which is governed by an undemocratic regime widely recognised as abusing human rights, the IFC has bankrolled Oxiana Resources (OR) and OR’s own chief financier, Rio Tinto. The IFC has even used the status of the regime and the reticence of other investors as a justification, maintaining that “political and regulatory uncertainties” have “dissuaded the world’s larger companies from investing in the country”.<sup>274</sup> The Sepon mine will, in the IFC’s own words “: require the relocation of two [Indigenous] villages (120 people) - if only to an area fairly close to their existing homes.” It is difficult to imagine how the rights or wishes of the affected communities are assured in such a process within the current Laotian state.

The Chad-Cameroon Pipeline Project (CCP), Africa’s largest development project, was approved in June 2000, after a lengthy and well-founded campaign against it, supported by far-reaching environmental and human rights NGOs. The CCP starts in the Doba oil fields at the southern tip of Chad, splits Cameroon in two along 670 miles, and ends at Kribi on the South-west coast of Cameroon. It traverses some of the most important rainforest remaining in the Congo basin, and cuts through the lands of the Bagyéli (pygmy) peoples. Promoted by the World Bank as a unique opportunity for “[it] to play a significant complementary role in reducing poverty in one of Africa’s poorest regions”, this project would not have been commenced without the benediction and funds of the Bank. Hailed by global development players as a “defining moment in World Bank history”, and “a prism through which the world views the institution and, it is likely, development assistance more broadly.” Clearly, the World Bank needs to prove that local communities and countries will truly benefit from this project in a lasting and sustainable way. This, unfortunately, is far from being the current reality. Even prior to construction, human rights abuses, repression and violence had occurred. Now, with construction roaring ahead, and due to be completed ahead of schedule, it is a tragedy. Violence and abuse has escalated in Chad, and the very survival of the Bagyéli in Cameroon is at risk. The latter depend almost entirely on the forest and forest products to provide for their subsistence-based lifestyle, increased logging, the high demand for bushmeat, loss of water resources, in-migration and social upheaval brought by the pipeline has left them with little to survive upon, and under severe cultural attack. The World Bank’s safeguard policy framework has remained largely unimplemented, and the current plight of the Bagyéli peoples is a violation of their human rights under significant and diverse human rights instruments<sup>275</sup>. In addition, in order to partially address the environmental problems caused by the pipeline project, the World Bank has, through the GEF, established two national parks in south-eastern Cameroon, which are now denying the traditional access rights to the Bagyéli population in that region (see below). The IFC’s involvement in this project has brought poverty, hunger and social collapse to the local communities.

The IFC has a key role in the Yanacocha mine in Peru, owned and controlled by US based Newmont mining. It was a critical catalyst for the provision of private loans and owns 5% of the shares itself. In 2000, the IFC facilitated an \$80 million loan for the further expansion of the mine. This was opposed by many locals including the local authority. The mine location coincides with a number of important rivers and tributaries upon which the city of Cajamarca

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<sup>274</sup> IFC SPI, December 14 2001.

<sup>275</sup> see FOEI/CED, 2002. *Traversing Peoples Lives*. FOEI. And Nguiffo, S., Breikopf, S. 2002. *Broken Promises: The Chad Cameroon Oil and Pipeline Project: Profit at any Cost?* FOEI, Milieudéfense, CED.

and the surrounding rural communities depend. These have already been severely polluted by the mine's operations, and remain unusable for a large part.

Since its inception, a failure to respect the wishes of the local campesino community or effectively protect the surrounding environment has been observed, and a complaint was filed by FEROCAFENOP and Project Underground, a US based NGO, with the Compliance Advisor Ombudsman (CAO) of the IFC (see box p 34). The IFC's Environmental Impact Survey here denies the indigenous roots of the campesino communities, despite most of them only speaking their native language, Quechua, and themselves self-identifying as indigenous peoples<sup>276</sup>. The refusal of IFC to recognise this indigenous status exempted the Bank from having to provide an indigenous peoples development plan and from adhering to the Operational Directive OD 4.20 on indigenous peoples. It also gives it greater leeway with respect to resettlement, to which 226 families were subject. Resettlement was however termed 'relocation' because according to IFC specialists, the people involved were merely temporary or seasonal land owners, thus exempting the IFC from the need to prepare any resettlement plans. This claim nevertheless contravenes OP 4.12 on Involuntary Resettlement which covers "(i) relocation or loss of shelter; (ii) loss of assets or access to assets; or (iii) loss of income sources or means of livelihood, *whether or not the affected person must move to another location...*" (emphasis added) which renders the IFC's assertions invalid.<sup>277</sup>

One of the most significant local concerns in the Cajamarca area is the contamination of the sources of water, a scarce and vital resource in the uplands, which is used for drinking, cooking, bathing, irrigation and for animal husbandry. Ongoing monitoring has led to reports citing dewatering (Newmont acknowledges it has depleted water levels in 4 out of 6 lakes in the region – this results in less irrigation water for local subsistence farmers), water contamination (Yanacocha gold mine is breaching WHO standards for drinking water, through leaching of cyanide solution, iron, sulfates and copper; the Yanacocha gold mine has contaminated 4 rivers, the only water source for many campesinos), fish and endemic frog species die-off (also found by the Peruvian Ministry of Fishing), air pollution, loss of biodiversity, including medicinal plants and frogs. In addition, on June 2, 2000, a truck spilled over 300 pounds of mercury in Choropampa, a rural village, and although the IFC claims that adequate consultation was held with the community, no one was aware of the dangers of mercury, and when the truck was struck down, many campesinos picked up the little balls of mercury and brought them home with them believing it was valuable, resulting in serious illness for over 400 people<sup>278</sup>.

The locals are steadily being forced to move to the town of Cajamarca, and as a result the close family and kinship ties are being lost, as men have to move away to find work in order to pay the rent. Traditional arts and crafts are being lost as the people are removed from their land and cultural base<sup>279</sup>. This results in the total disarticulation of the social economy, upon which the continuance of the culture is based. The Federation of Las Rondas Campesinas (LRC), a constitutionally recognised organisation has set up an office in Cajamarca where they deal with social issues, including problems surrounding the Yanacocha mine, the rights of women and indigenous crafts. Yanacocha has provided the most work for them for the past few years. Family related problems (non-recognition of children, abandonment of families, failure to pay child support, domestic abuse) have all been on the rise since the mine was started (from 8% to

<sup>276</sup> Project underground and FEROCAFENOP, 2001. Complaint Concerning Miner Yanacocha, S.A. submitted to the Compliance Advisor Ombudsman of the IFC.

<sup>277</sup> *ibid*

<sup>278</sup> *ibid*

<sup>279</sup> Project Underground, 2000. Newmont: Why are people around the world so MAD at this company? <http://www.moles.org>

25% of the problems LRC was dealing with, before and after mining began, respectively). Debt problems have sky-rocketed from 2% in 1986-88 to 44% in 1995-97, which increase the feeling of inadequacy and resentment within the population, specifically the men.

*The Multilateral Investment Guarantee Agency (MIGA):*

In 2001, MIGA issued the following statement in rebuttal of NGO expressions of concern about its guarantees:

*MIGA's activities do not promote or subsidize poor corporate behaviour at the expense of people and the environment. The broad statements made in the report that MIGA's activities are anti-environmental and fail to promote economic growth or alleviate poverty are untrue. And there is no evidence to support the claims that MIGA's clients have poor environmental and human rights records. On the contrary, the agency supports only projects that have a positive developmental impact, sponsored by corporate clients who operate by the guiding principle that "good corporate citizenship is good business".<sup>280</sup>*

The Multilateral Investment Guarantee Agency was set up by the World Bank at the beginning of the 1990s for the provision of political risk insurance loans to private companies wishing to invest in development projects undertaken in developing countries where alternative cover was difficult to obtain due to political instability. The formation of MIGA was one concrete response to the demands of international companies for guarantees to protect investments in the South. MIGA is a significant contributor to World Bank activities in extractive industries sector, and some of the projects it supports have had far-reaching social and environmental implications. However, MIGA, like IFC, operates as a commercial enterprise and according to commercial standards. When information disclosure concerning these projects is sought, the MIGA frequently invokes company privacy clauses inhibiting it from providing operation information, rendering this branch of the World Bank both opaque and lacking in accountability. In 1999, the MIGA elaborated its own reduced set of safeguard policies, namely a policy on Environmental Assessment and one on Information Disclosure. The latter however still does not appear to operate in many cases.

The MIGA has provided guarantees for projects in Papua New Guinea and West Papua among others, because these two countries are said to have an inherently unstable political and economic record. Indeed the first mining project insured by MIGA was the giant Freeport mine in West Papua. The irony of this is that the instability of West Papua is closely associated with and largely caused by this mine. The Grasberg mine is the world's largest copper and gold mine owned by Freeport McMoran of the USA and Rio Tinto UK it is also one of the world's most notorious mining projects.

MIGA also extended support to the Lihir mine in Papua New Guinea, a project of Rio Tinto. Although widely broadcast as a pioneering project in terms of community participation, the Lihir mine has generated many problems. The MIGA guarantee was provided conditionally to a controversial structural adjustment programme (SAP) being accepted by the PNG government. This SAP required the government to cut public sector employment, abolish price controls of basic foodstuffs and minimum wages, introduce hospital fees and render obligatory the registration of customary land tenure<sup>281</sup>. Since 97% of PNG's land is owned by indigenous

<sup>280</sup> Ref MIGA letter of response to Friends of the Earth International dated 28. September, 2001

<sup>281</sup> Berne Declaration, 1996. Tainted Gold from the Pacific.

<http://www2.access.ch/evb/bd/lihir.htm>

people through customary tenure, necessary registration would break the age-old accepted system and ultimately threaten loss of land rights to many.

On the island of Lihir, the people have suffered severe cultural and economic disruption as a direct result of the mine. Local lay and church leaders have complained of the breakdown of communal values, rise in gambling drinking and other vices, damage to sacred sites and lasting damage to the land and sea. The project will destroy one of the most revered religious sites in Lihir, as well as graveyards and culturally important hot springs, all of which violates World Bank safeguard policies on Indigenous Peoples, Natural Habitats and Cultural Property. All were associated with the introduced cash economy overpowering and displacing the pattern of local subsistence economy.

MIGA gave its approval to Lihir despite the use by the company of experimental and dangerous technologies. The mine operates on a small island. Best practice in the mining industry suggests that mining on small islands, especially where inhabited should be avoided because of the disproportionately large impact especially from the waste. In addition the Lihir mine adopted submarine Tailings disposal. The processing of millions of tonnes of ore over the 40 years of mine lease is estimated to result in 341 million tonnes of waste rock<sup>282</sup>. It is expected that 1800 tonnes of toxic sodium cyanide will be used annually to separate the gold ore from the body of the rock<sup>283</sup>. Residues of the cyanide and other toxics in the ore will be discharged into the sea. This disposal mechanism will severely affect the biodiversity-rich coastal environment, and have fundamental knock-on effects on the livelihoods of subsistence fishers from the coastal areas. According to local fisherfolk this has already occurred. The company has in fact been brought to court by Greenpeace in 2002, accusing them of dumping levels of pollutant vastly exceeding internationally set standards, established under the London Convention on Sea Dumping.<sup>284</sup>

*Guaranteeing disaster:*

In 1992, MIGA issued two reinsurance contracts totalling \$49.8 to the Canadian mining companies, Cambior Montreal in partnership with Golden Star, to mine gold in the Omai mine in Guyana (see box). In 1995, in one of the most serious environmental disasters in Guyana's history, a faulty tailings dam ruptured releasing 3 to 4 cubic metres of cyanide, and toxic heavy metal-laced sludge into the Omai and the Essequibo rivers. The spill resulted in the loss of drinking water and domestic water, as well as the temporary loss of livelihood for 23,000 indigenous and local communities, who depend almost entirely on the river for their day-to-day subsistence needs and whose lives were severely and disproportionately affected by the spill. In 1997, Lecherches Internationales Québec, a Canadian NGO filed a motion to authorise a class action law suit on behalf of the victims of the spill, but the suit was dismissed in Canada on the grounds that it should be heard in Guyana. Yet within Guyana the government is a shareholder in the mine and attempts at legal redress have not prospered. Many people remain to this day without adequate compensation and living a life of continued deprivation.

Despite the fact that many indigenous families, living along the banks of the Essequibo, alleged they had suffered major losses of their fish, pollution of their crucial freshwater supplies, and

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<sup>282</sup> Berne Declaration, 1996. Tainted Gold from the Pacific.

<http://www2.access.ch/evb/bd/lihir.htm>

<sup>283</sup> Chatterton, P. 1996. RTZ Dumps on Lihir. Mining Monitor, Feb 1996.

<sup>284</sup> Greenpeace International, 2002. Sea dumping of wastes from the mining industry: the case of the Lihir gold mine, Papua New Guinea. Paper submitted to the London Convention– 24<sup>th</sup> Meeting (November 2002) and Mineral Policy Institute, 2002. Lihir and International Law. MPI [http://www.mpi.org.au/rr/docs/lihir\\_international\\_law.pdf](http://www.mpi.org.au/rr/docs/lihir_international_law.pdf)

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adverse health effects, they were never adequately compensated. Attempts to bring claims against the company and the Bank are continuing.<sup>285</sup>

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#### **Comsur and World Bank in Bolivia**

The year following Omai, a tailings dam in the Bolivian mining region of Potosi, operated by the country's largest private mining enterprise, Comsur, collapsed twice. Locally-based scientists believe that up to 400,000 tonnes of sludge, loaded with iron sulphides, lead, zinc, cadmium, copper and arsenic, cascaded into the El Porco river<sup>286</sup> (The Company itself came up with a figure of 180,000 tonnes<sup>287</sup>). Three hundred square kilometres of river and farmland, tilled by some 50,000 indigenous campesinos, was contaminated<sup>288</sup> and wastes reached as far as the Pilcamayo basin<sup>289</sup>.

Comsur was part-funded by the IFC in 1994 just after its owner, Goni Lozado, won the Bolivian presidential elections for the first time on a "neo-liberal" ticket. Comsur had been re-capitalised in 1992 by Rio Tinto (then RTZ), which bought up a third of its equity, thus undoubtedly providing the imprimatur of "good actor" as ostensibly required by the Bank.

One savage irony is that, not only were the Omai and Comsur mines managed by high profile mining companies but that almost every major tailings disaster since 1991 has been directly attributable to the irresponsibility of companies which are viewed by the Bank as precisely "its kind of player."<sup>290</sup>

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In August 2000, more than seventy Russian and international NGOs called on the World Bank not to support environmentally sensitive projects including mining operations in the wake of the new President, Vladimir Putin's abolition of the country's main environmental agency.

Despite this, MIGA went ahead in granting a US\$27.2 million political risk cover to an untried company called New Arian Resources, a subsidiary of Bema Gold based in Canada, for the construction of the 79%-owned Julietta underground gold and silver mine in Magadan, an indigenous part of Russia's Far East Region<sup>291</sup>. No information on the project or its social and environmental impacts was released by MIGA before issuing the guarantee. How did the agency justify this critical failure? It said the project was approved before its disclosure policy went into effect in July 1999, so it was not required to divulge the vital information.

MIGA defended the project in an August 2000 letter to the Pacific Environment and Resources Center. The mine would "have a positive development impact on the Russian economy" while MIGA involvement "should also provide comfort to all concerned that compliance with the World Bank Group's environmental guidelines and Russian environmental law will be monitored carefully"<sup>292</sup>.

But, according to a technical expert who visited the project in February and March 2001, Bema had already violated good practice principles. The tailings dam is located on an area "far larger than needed" which had been "stripped down to the permafrost level [with] the insulating and

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<sup>285</sup> see, inter alia, S Dennison Smith „Chronicle of a Disaster Foretold: The Omai Gold Mine in "Mining Issues", Number 1, LAMMP, Bromley, Kent, January 1999.

<sup>286</sup> [New Scientist, London, 23/11/1996].

<sup>287</sup> [Comsur press release, La Paz, September 1996].

<sup>288</sup> [Times, La Paz, 31/10/1006]

<sup>289</sup> [New Scientist 21-28/12/96].

<sup>290</sup> Moody, op cit].

<sup>291</sup> [see E Schwartz „World Bank Backs Russian Gold Venture Over some Objections" Bloomberg News Service, USA, August 10 2000].

<sup>292</sup> Motomichi Ikawa, Letter to Pacific Environment and Resource Center, August 16 2000.

moisture-absorbing layers of soil, tundra and organic material removed ... the dam is less than 50 yards from a stream and two kilometres from a major river which could be affected by seepage or a larger cyanide spill<sup>293</sup>.

The Bank's lack of oversight in the case of the Julietta project is all the more culpable given its record over the past five years in the case of the huge Kumtor mine in Kyrgyzstan, operated by another Canadian company – Cameco. This too is located under permafrost and threatens the surrounding glacial environment. But whereas a “failure” has yet to occur at Julietta, several disasters have already afflicted Kumtor. The worst of these happened in 1998 when a truck carrying sodium cyanide slithered off an inadequate approach road, dumping part of its cargo into the river.

*Global Environment Facility:*

The Global Environment Facility was established in 1992 nominally in order to provide a global fund for environment projects which affect the planet as a whole, such as climate change and fishery depletion, although it also provides grants to single states. It is financed through the World Bank and the UNDP, and its programmes and projects operated by both these ‘Implementing Agencies’. The UNDP and the World Bank operate different types of grants however, the former being in charge of small grant projects, whilst the latter financing the larger scale international grants. The GEF is linked to the Bank, through staff and funding mechanisms, and its offices are found within the Bank's buildings in Washington.

Since its inception the World Bank has essentially used the GEF as a mechanism for externalising the accumulation of environmental debt it accrues through the polluting and destructive projects it finances. The World Bank provides large amounts of grant money to GEF projects, has control over how they are implemented, and is accused of using it to paint a veneer of environmental concern over its most harmful activities. In addition, the large and costly GEF programmes supported by the Bank have suffered many failures.

An example of the World Bank's use of the GEF to secure a green-tinted censure-defusing asset is that of the establishment of two national parks in south-east Cameroon (the Campo Ma'an National Park and the Mbam Djerem National Park) as biodiversity-offset areas to compensate for the loss of biodiversity due to the construction and implementation of the Chad-Cameroon Oil Pipeline. The government foundation set up to provide grants for the implementation of the Chad-Cameroon Indigenous Peoples Plan has largely spent the sum reserved for the management of the park on field staff, and has selected two international conservation NGOs, WWF and Wildlife Conservation Society for park management activities. In Campo Ma'an, Bagyéli communities worry that their rights to practice their subsistence livelihoods will be under increasing threat from the new protection measures currently under consideration by WWF, who have so far failed to consult with local communities<sup>294</sup>. To add insult to injury, although the park supposedly restricts hunting and logging within its boundaries, they have failed to stop logging and destructive extraction activities in the forests, the effects of which will be felt by the local traditional forest users.

*Mechanisms of Redress*

In the wake of two highly critical and devastating reports on the World Bank's inability and unwillingness to comply to its safeguard policies (the Morse Commission Report, 1992 and the Wapenhans Report, 1992 – see Section 8), and continued international environmental and human rights critics, on September 21<sup>st</sup>, 1993, the Bank's Executive Directors passed a

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<sup>293</sup> [Private communication February-March 2001]

<sup>294</sup> Nelson, J. 2002. Cameroon: Bagyéli struggling to be heard. WRM Bulletin, no. 62

resolution creating an inspection panel. The stated aim was to increase accountability and compliance within the Bank's often obscure and destructive projects. The panel would be composed of functionally independent staff, appointed by the Bank President however; and as a body, it is not strictly independent, since the Board of the Bank has the power to veto requests for inspection. The fundamental issue is whether the Bank management acts on the inspection panel reports and recommendations in reality, since the Inspection Panel has no authority over the Bank's remedial action. The World Bank president, James Wolfensohn stated in 1998 that the Inspection Panel is a "bold experiment in transparency and accountability that has worked for the benefit of all concerned". Indeed, it has been a positive instrument in cases such as the China Western Poverty Reduction Project, and the Arun Dam in Project in Nepal, where the investigation led to the cancellation of the projects before they had begun implementation<sup>295</sup>. If the project is underway however, the inspection panel has little power over the actions taken as a result of its efforts. Following the report on the NTPC power plant in Singrauli, no income restoration has been achieved, the social and environmental situation there remains woefully poor.

Currently, the Inspection Panel is involved in investigating the Cameroon social and environmental policy implementations for the Chad-Cameroon Pipeline Project. It published the Chad Investigation Report in November 2002, finding serious violations of the World Bank's policies, such as consultations being carried out in the presence of armed forces. It also stressed the unacceptability of only 5% of the revenues from the project being invested directly into the oil-producing region of Doba, with no adequate measures in place to effectively provide poverty alleviation, such as delays in capacity-building projects and insufficient attention being brought to the governance and human rights problems in Chad. The Bank's responses to the report were weak and unsatisfactory. It tried to shift the blame and responsibilities to the consortium and the government of Chad, whilst claiming credit for various "successes". The Investigation Panel is also in the final stages of preparing an Investigation Report for the Cameroon side of the Chad-Cameroon Oil and Pipeline Project.

In December 2002, the Inspection Panel released the report on the investigation of the Coal Sector Environmental and Social Mitigation Project. The report is highly damning of the project's compliance to World Bank operational policies, finding non-compliance with virtually every section of the policies on resettlement, environmental assessment and indigenous peoples, as well as those on monitoring and information disclosure. The report finds the attitudes towards resettlement particularly lacking: "management's failure to ensure that the original Resettlement Action Plan (RAP) reflected reality on the ground resulted in many problems. Many of the displaced Project-affected persons (PAPs) have not been and are not being compensated at full replacement cost, with the result that many have suffered and continue to suffer harm." It found that this is due to the lack of transparency in the measurements of existing land and housing, the failure to realistically value the existing land and housing, offer a wide choice of resettlement locations, and provide adequate jobs and income-generation schemes. The Panel make many recommendations for amelioration of the current situation, including the establishment of an Independent Monitoring Committee with the mandate to keep up to speed with social and environmental issues on the ground. Since the Inspection Panel has no authority over the Bank's implementation of its recommendations, the claimant NGO, Chotanagpur Adivasi Sewa Samiti (CASS), has drawn up an Action Plan which it hopes the Bank's Board will endorse (see India Case Study for further details).

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<sup>295</sup>Clark, D. 2002. The World Bank and Human Rights: The Need for Greater Accountability. Harvard Human Rights Journal, Vol 15, p 205-226.

On the whole, the Inspection Panel is a mechanism which may allow some instances of the World Bank's social and environmental malpractice to be exposed, but the findings rarely fuel any real change within the Bank's practice on the ground.

*The IFC and MIGA's Compliance Advisor/Ombudsman*

In 1998, president Wolfensohn approved the creation the Compliance Advisor/Ombudsman (CAO) to fulfil a role similar to that of the Inspection Panel for the IFC and MIGA, although these two institutions also require the services of the Inspection Panel, since the CAO only has an advisory and informal problem-solving role, and one individual is responsible for investigating a claim. The CAO is also appointed by the president of the World Bank. Experience with the CAO is thus far not very extensive, but within the extractive sector, has been highly criticised, in the Yanacocha mine in Peru (see box), and in the MIGA-guaranteed Bulyanhulu Mine in Tanzania.<sup>296</sup>

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**BOX**

**The Yanacocha Gold Mine and the Compliance Advisor Ombudsman of the IFC**

The Yanacocha mine has caused a number of devastating environmental and social problems of its own ranging from severe water contamination and a major mercury spill to an upsurge in prostitution, alcoholism and domestic violence. In short, the mine has had and is having severe negative impacts on the way of life of thousands of indigenous campesinos and has impacted the health and safety of the entire *Cajamarquino* community. The mine was opposed locally before its entry. The experience of mining has strengthened opposition in some quarters. There is a strong movement to prevent the further expansion of the operations of the company supported not only by indigenous groups and NGOs but by the local government in Cajamarca.

In March, 2001, Project Underground, a USA based NGO, and the Rondas Campesinas, a local community organisation filed a complaint with the Compliance Advisor Ombudsman (CAO) of the IFC. The complaint alleges numerous, violations of IFC and World Bank social and environmental safeguard policies in the mine project, most notably the mine's failure to consult with the affected community as part of the environmental impact assessment process and its refusal to recognize the affected communities as indigenous people entitled to special protection under the World Bank Policy on Indigenous Peoples.

The filing of the complaint was for the communities an expression of their grave concern and deep dissatisfaction with the role of the mine in entering and operating in their region without their consent. Bringing the complaint was a desperate strategy entered into in the absence of any other more satisfactory means of raising their opposition or gaining redress. Newmont mining company exerts enormous power in the local area both directly through its presence and economic domination and also through its ability to influence government and other support. Many attempts to protest the failures of the mine have been blocked or ignored or delayed by officials. It is fundamental to an understanding of the need for effective means of redress that the concerned communities complaints about disregard for their wishes and concerns. They further express their concern at their marginalisation in the processes of mine development and decision making. The CAO or any process that might offer effective redress would need to actively address this power imbalance to hope to contribute positively to satisfying the concerns of the affected peoples.

In this case the CAO accepted the complaint. Since September, 2001, the CAO has sponsored a "stakeholder" mediation process called the "*mesa de diálogo*" or "dialogue table." *Mesa* participants represent many sectors of *Cajamarquino* civil society, including the mine, the Rondas, the municipality, government agencies, the university and, until their withdrawal from the process, non-governmental organizations (NGOs). The CAO hired a team of private mediation consultants to facilitate and oversee the *mesa de diálogo*.

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<sup>296</sup> Lawyer's Environmental Assessment Team, 2002. Assessment Summary of the Complaint Regarding MIGA's Guarantee of the Bulyanhulu Gold Mine, Tanzania.

In April, 2002, Project Underground facilitated a *campesino* community evaluation of the *mesa*. They have produced an account of their findings<sup>297</sup> which argues that the Compliance Advisor Ombudsman (CAO) has in practice not addressed the fundamental problems of the local people, as expressed in their original complaint, but instead has operated as an extension of company efforts to pacify the local community by improving the quality of the social interaction rather than addressing the central substance of their complaints.

The community complainants had a clear and substantial priority list of specific issues that needed addressing. These included the failure of the company and particularly the IFC to recognise the affected communities as being indigenous peoples entitled to the protections of Indigenous peoples within a Bank supported project. They also called specifically for an urgent medical study of the victims of the mercury contamination in Choropampa caused by mining company negligence. They further called for an independent study of the impacts on flora and fauna and a further study on air pollution. Of central importance to the affected communities was their opposition to further mining development in the Cerro Quilish watershed. These and other concerns were identified in the first meeting.

Despite this prioritisation, the process has not effectively addressed these issues. Discussion of the Cerro Quilish issue was excluded from the process against the wishes of the affected communities and in line with the wishes of the company, who, on this issue, have refused community consultation and are pursuing their claim through the courts. The expert investigations on biodiversity and air pollution, after being deferred, were eventually ruled out as beyond the budget of the process. A main activity of the *mesa* has been the conduct of capacity building workshops seeking through role play in hypothetical situations to better understand constructive conflict resolution. These have been led by consultants hired for the purpose. However these have been criticised for failing to address the power imbalance that exists between company and community. Indeed community and NGO representatives observed a bias towards the company and its high-tech presentations while community speakers are strictly time limited in their inputs. Project Underground staff, which in accordance with IFC CAO procedures jointly filed the complaint, have found themselves excluded from the exchange of communications on its status. The mediators also stand accused of cultural insensitivity in relying heavily on abstract concepts and written materials, which marginalize or exclude the peasant participants.

In addition the mediation team have consistently failed to address the substance of the supposed breaches of Bank guidelines. It is suggested that these may not even be understood by the mediation team. In particular the mediation team has not addressed the crucial issue of the rights of the people as Indigenous. The CAO is claimed to be a mechanism for IFC accountability to the communities affected by projects it finances however the CAO stands accused here as failing to address or even fully understand the accusations of breaches of Bank IFC policies. In the assessment of their experience with the CAO Project Underground are scathing

*'The CAO team has fostered the notion that the mesa de diálogo is a substantive achievement, an end in and of itself rather than a means to an end. The fact that parties in conflict sit in one room and talk politely to each other is heralded as a substantive achievement, regardless of the content of the dialogue or its outcome.'*

*'The mesa is premised on the assumption that environmental protection and economic development are common ground for dialogue. This assumption glosses over the fundamental issue of whether the mine should continue to be the pillar of the Cajamarquiño economy and whether the mine has a social license to operate in Cajamarca at all. At no point during the mesa has there been a space in which to discuss the short and long term political, social and environmental implications of the mine's domination of the local economy. At no point during the mesa has there been any acknowledgement of the incompatibility of the mine with the campesino way of life or the promotion of sustainable development in the area. If these more fundamental themes were broached, issues such as mine expansion and duration and alternative models for economic and social development would be discussed. Instead, the discussion is limited to mitigation of the harmful effects caused by the mine and how the mine's development foundation will allocate its resources.'*

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<sup>297</sup> Project Underground, 2002. The Path of Least Resistance: An Assessment of the Compliance Advisor Ombudsman's Handling of the Minera Yanacocha Complaint

*The International Advisory Group*

The International Advisory Group (IAG) was set up in 2001 to monitor the Chad-Cameroon Pipeline project's compliance with the World Bank's social and environmental safeguards. It was established in the wake of an international outcry against the World Bank's approval of the financing of this environmentally and socially destructive project. Initially, it was to be the Independent Advisory Group, but the World Bank modified it, maintaining a portion of control over the process. The IAG has produced two highly critical reports since its creation, and has been commended by the NGO movement for doing so. Nevertheless, it has been criticised for skirting round issues of corruption and violence, and avoided those relating to human rights and in this respect needs to broaden its mandate<sup>298</sup>. In its latest report, the IAG noted, amongst others, that the only occasion upon which structured social dialogue took place was on its own rare visits; that the public dissemination concerning Chad-Cameroon Pipeline project documents was still not adequate; that there has been no capacity building for governmental monitoring of the project; that the pipeline construction speed was not being matched by the speed of implementation of social and environmental measures; and that the health concerns due to dust emissions and sexually transmitted disease are severely affecting the population<sup>299</sup>.

The IAG suffers similar limitations to other internal monitoring bodies in that while it may make strong recommendations in its reports, but remains powerless as to their implementation. The IAG has called for detailed reports and action plans to address the environmental and social impacts of the pipeline construction, but the task of mitigating risk and ensuring corrective and capacity-building measures are taken are consistently delayed by the Bank<sup>300</sup>.

*Case studies*

The Case studies that accompany this synthesis paper provide a graphic picture of some of the problems generated for Indigenous peoples by Bank financing for the EI sector. Summaries of the case studies are also provided below to highlight some key findings.

Overall the picture presented by this review of Bank experience is of the potential and realisation of severe negative impacts for indigenous peoples, and a lack of care and due diligence in the Bank. In addition it is important to record that such abusive relationships with indigenous peoples have historically been commonplace in the dealings of EI companies with indigenous peoples.

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<sup>298</sup> The Chad-Cameroon Oil and Pipeline Project : A Call for Accountability. 2002. Association Tchadienne pour la Promotion et la Défense des Droits de l'Homme, Centre pour l'Environnement et le Développement, Environmental Defense.

<sup>299</sup> International Advisory Group, 2002. Report of visit to Cameroon and Chad: October 15 to November 4, 2002.

<sup>300</sup> Horta, K. 2003. The Chad/Cameroon Oil & Pipeline Project – Reaching a Critical Milestone. Environmental Defense.

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## **Cameroon: Case Study on the Chad Cameroon Pipeline (CCP) and its impacts on the indigenous Bagyéli peoples**

### **Background**

Benefiting from 2 WBG loans, the CCP traverses Cameroon from the border with Chad, to the ocean, cutting through some of Africa's most pristine old growth tropical rainforest, and through the villages of Bagyéli (pygmy) communities in the south. Sixty-six percent of Bagyéli villages (comprising 229 people) are located less than 1 km from the pipeline route, and the pipeline's impact on the environment and subsistence of the Bagyéli peoples has been considerable.

### **Consultation, participation and false promises:**

Consultation processes were shamefully deficient, baseline socio-cultural studies were extremely poor and participation was tokenistic – in all, the way in which these were dealt with on the ground is insulting to the Bagyéli peoples. The 'Fondation pour l'Environnement et le Développement du Cameroun' (FEDEC) was established by the pipeline consortium to ensure social and environmental issues were dealt with. It has so far been completely ineffective. Less than 5% of affected Bagyéli people were employed on the pipeline, even for unskilled labour, which they consider ought to be theirs. The Bagyéli have been promised health facilities, improved education for their children, identity cards, land titles, and built houses. They only received insignificant consumer goods such as small agricultural tools and foodstuffs. Medication has been placed at the sparse medical centres of the region, but it had to be paid for and the Bagyéli have little access to money. No adequate compensation was made to the Bagyéli: the Bantu, their neighbours, misrepresented that the land around the pipeline was theirs and falsely claimed compensation for it. The Bagyéli have been left landless.

### **Negative Impacts of the pipeline**

- ◆ Disturbance of their hunting grounds: the Bagyéli have to travel much further in order to find game
- ◆ Loss of important non-timber forest products, including a sacred tree, the "Neeng", which has a great deal of power
- ◆ Destabilisation of the Bagyéli's health
- ◆ Destruction of property with no compensation

### **Recommendations:**

- ◆ The Bagyéli should be given equal rights, including land titles, as any other Cameroonian
  - ◆ The FEDEC should be the product of the real needs and interests of the Bagyéli community
  - ◆ The Bagyéli should oversee projects directed at their needs and development
  - ◆ All promises should be fulfilled: land titles, building houses, supplying national identity cards, assistance with education, medical assistance, and agricultural extension services provided, etc.
  - ◆ The consultation system should be more relevant
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## Colombia: the World Bank's influence on Mining Legislation

### Background

- ◆ Colombia is a country at war: between an abusive right wing government and paramilitaries and the left wing guerrilla.
- ◆ IPs find themselves in the middle of this conflict, simply trying to defend their legally recognised territories and their ways of life. More than 300 leaders have been assassinated in recent years, because of their attempts to bring justice for IPs.
- ◆ The WBG supports OGM as a viable option for 'sustainable development' in Colombia: through its Country Assistance Strategy and other technical assistance loans to Colombia
- ◆ Democracy is nonexistent, and the state has impunity on corruption, which is a fundamental disease in Colombia's governance.
- ◆ 52% of extractive industries revenue is lost to corruption in Colombia, so the WBG's support of OGM is supporting corruption
- ◆ The influence of cash creates a slave-like relationship between communities and mining companies

### The mining code and poverty reduction:

- ◆ The mining code was elaborated with no participation from indigenous peoples, it was elaborated entirely by corporations, based upon the World Bank's policy of liberalisation, deregulation, free-market, low taxes and payment of minimal royalties
- ◆ The current Colombian constitution is very progressive regarding the human rights of indigenous peoples, and yet the new mining code directly encroaches upon these rights. How can such legislation be unconstitutional and yet upheld?
- ◆ Mining activities are becoming more and more illegal, in many areas there is no government control on company activities, and IP communities are being pressured to leave, through violent and abusive methods
- ◆ The WBG is merely enhancing Colombia's current debt servitude to the west through providing more loans and permitting all revenues to escape the country through corruption and unfettered trade

### Conclusion:

The Bank is complicit in the corruption and abuse through its continued funding.  
There is no adequate governance so investment inevitably fuels corruption and abuse.

### Recommendations:

- ◆ IFIs should withdraw funds from companies which have abused human rights
  - ◆ The Mining Code should be scrapped and rewritten with full participation and consultation with indigenous peoples
  - ◆ There should be a moratorium on all mining and all exploration on Indigenous Lands, since these disrupt local livelihoods
  - ◆ Those companies that don't comply with the law should be brought to justice
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**INDIA: Coal Sector Environmental and Social Mitigation Project.  
Case Study from East Parej**

**Background:**

The extractive industries, such as coal mining, have both indirect and direct impacts on Adivasi (indigenous peoples) livelihoods. The latter affects indigenous lives through loss of land, water and forest resources of important subsistence value; the former affects them through the influx of a cash economy, discrimination from national society, the break down of social structures, debt bondage, land alienation, the collapse of self-sufficiency and the erosion of Adivasi identity.

East Parej is one of three open pit coal mines operated by Central Coalfields Ltd (CCL), a subsidiary of Coal India Ltd (CIL), in Jharkhand. The objective of the Coal Sector Environmental and Social Mitigation Project (CSESMP) was to assist CIL in making coal production more environmentally and socially sustainable. It followed on from the World Bank's previous loan: the Coal Sector Rehabilitation Project, whose aim was to rehabilitate old coal mines and establish new ones in order to bring India to the forefront of coal production. The World Bank loans were cancelled before the due closure date.

**World Bank, government, and private sector consultations and dealing with a affected communities :**

The CSESMP was due to resettle 290 families in this area. Consultations regarding this resettlement were a travesty: some of the consultations were made with people unaffected by the mines; alleged consultations made with people who had died years before; consultations were punctuated by misinformation, as well as intimidation, aggression and threats. Those families who refused to agree to the terms of resettlement were forcibly evicted from their homes.

**Implementation of the WBG's Safeguard Policy Framework: the Inspection Panel**

Following a request for inspection submitted by a local IPO, the WBG Board approved inspection in September 2001. The Inspection Panel's report is damning: it found 31 points of non compliance with WBG Safeguard policies, including the OD 4.10 on Environmental Assessment, the OD 4.30 on Involuntary Resettlement, the OD 4.20 on Indigenous Peoples, and various items of the policies on Forestry, Cultural Property, and Natural Habitats. It also points to a severe lack of foresight, humanity and will to ensure the people are not damaged by the project.

**Outcomes of the project for Indigenous Peoples:**

- ◆ IPs were offered no land-for-land compensation programmes, but rather were given cash, which is an unsustainable medium, completely alien to indigenous peoples
- ◆ Traditional land rights were not recognised and titles not provided, leaving many of the oustees landless as a result.
- ◆ No effective income generation and restoration schemes were offered; inappropriate self-employment opportunities generally failed.
- ◆ The lack of effective transparency and participation of indigenous peoples left them feeling frustrated, marginalised and unable to voice their genuine needs and concerns

**Conclusions:**

Even where safeguards exist there is currently no effective control over the standard of implementation or outcomes.

**Recommendations :**

- ◆ Viable livelihoods need to be restored to the affected peoples, indigenous land titles need to be established and given to the people, and health, education and water amenities need to be addressed by the project management; livelihoods need to be restored in a fully participatory and consultative manner.
  - ◆ Compensation must be fair and just, and fully negotiated and agreed upon by the affected peoples
  - ◆ Rehabilitation of the mine sites must be effected immediately
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## **Indonesia: the closure of Kelian Gold Mine and the role of the Business Partnership for Development/World Bank**

### **Background:**

Kelian Equatorial Mining, a gold mining venture situated in East Kalimantan, is 90% owned by the mining company Rio Tinto Plc. It started production in 1991, and the mine is due to close in 2004. Gold had been discovered years before, and had been mined artisanally by the locals since then. The indigenous (Dayak) communities in the area depend on agroforestry, farming, non timber forest products and bushmeat for subsistence.

### **Kelian Equatorial Mining and the local community**

When KEM was established, the locals were forbidden mining, agroforestry and agriculture on the lands within the KEM concession, and became poorer as a result. The water and air pollution resulting from the mine have killed off fish and created serious medical conditions. KEM's guards harassed, beaten up and shot at local people mining around the Kelian concession, despite the regional governor issuing an edict permitting artisanal mining within 50 metres of the river bank. In addition, people have been evicted from their lands with no prior consultation, graves have been destroyed, local women have suffered sexual harassment such as rape from the KEM staff, high placed officials included, and there have been repeated cases of arbitrary arrest and detention.

The local people made many demands to the company, including compensation for land which the company never paid, compensation for land where the payments were inadequate, compensation for the loss of miner's livelihoods, compensation for the destruction of homes and shelters, reduction of the dust pollution, measures to tackle environmental problems, measures to end and redress all human rights violations, and honouring of promises made by KEM at the outset regarding drinking water, electricity, site rehabilitation etc. The community went through lengthy and time-consuming processes, including letters, travelling to the provincial capital, taking grievances to Jakarta, campaigning in Australia, and the UK

### **Closure of KEM mine**

The mine established a Mine Closure Steering Committee (MCSC) to prepare for closure in 2004. LKMTL (the Foundation for the Mining Community's Livelihoods and Environment - the community organisation), which has been at the forefront of the community's struggle for redress, was involved in the (MCSC). Business Partnerships for Development, a World Bank initiative to address conflict issues in community relations.. The KEM case was brought to BPD by Rio Tinto, although the community knew nothing of this. The problem with BPD and the MCSC is that there is an imbalance in the dialogue in favour of government and industry, who collude representing a stronger voice than the community. The community feels the whole was being used by Rio Tinto as propaganda for other mining operations, and so LKMTL withdrew from negotiations in March 2003. There is a profound difference between the long-term views of the community and the short-term impact-mitigation view of KEM. The community feels it is not being heeded as it should.

### **Conclusions and Recommendations**

- ◆ indigenous peoples have rights to natural resources as well, and must not be treated as mere bystanders in their own development
- ◆ the existence of a mechanism for dialogue involving indigenous communities, governments and industry does not always mean it is fair or balanced. The Kelian community has experienced such dialogue negatively

## **Philippines: The Impact of the Mining Act of 1995 on Indigenous Peoples**

### **Background**

- ◆ The Philippines are very rich in mineral resources, although the mining industry suffered a crisis of investment from 1985, where mineral production suddenly dropped
- ◆ The ADB attributed this to lack of foreign investment and a bad investment climate
- ◆ The World Bank-promoted policies of liberalisation, free-market and increased export featured largely in government, industry and IFI dialogues at the time, many such seminars were sponsored by the WBG.

### **The Mining Act of 1995:**

The law mandates the state to manage, control and supervise exploration, development and utilisation of mineral resources. It offers a vast array of financial and legal incentives for foreign private companies to invest in mining in the Philippines. As a result, exploration and exploitation applications now cover most of the Philippines. Many mining permits have been issued. The law allows mining on indigenous lands, although free prior and informed consent (FPIC) is required. There was no indigenous consultation regarding the Mining Code, nor were the potential impacts researched.

### **Impact of the Mining Act of 1995:**

There has been a severe lack of appropriate consultation and participation of indigenous communities. They are often a sham, seriously wanting in real substance. The use of manipulative tactics, such as divide-and-conquer, deception and bribery by the companies to obtain 'FPIC' has caused severe social disruption in once peaceful communities. Militarization has become the norm, with an evident and unacceptable tie-up between companies and the military, a concern which was expressed by the UN Special Rapporteur on the Human rights of Indigenous Peoples, at the time of his trip to the Philippines in December 2002. Indigenous Peoples have been forcibly relocated and displaced from their lands, and land ownership and access struggles have escalated. There is a serious lack of adequate protection for IPs, and the biodiversity they utilise, through EIA process.

Following a nation-wide massive protest against this Mining Code, exploration and new permits have been held up, although there is no indication that this will remain the case.

### **Conclusion:**

- ◆ Both directly and indirectly, the World Bank has influenced the crafting of many national mining codes and the policies of other IFIs and agencies all over the world, which promote privatisation, deregulation and liberalisation
- ◆ These reforms have had massive adverse impacts on indigenous communities greater than those of specific projects
- ◆ Indigenous peoples all over the Philippines are vehemently opposed to mining on their ancestral lands, and know from their experience that there is no such thing as 'sustainable mining'

### **Recommendations:**

- ◆ The Mining Code should be scrapped
- ◆ There should be a moratorium on all mining projects until a new mining law is passed
- ◆ This new law and its implementation should: uphold IP rights, declarations for mining free zones, right to determine all developments within their lands, ban open pit mining, submarine tailings disposal, ban mining where ecosystems are fragile, ban licensing of permits to foreign companies, especially those with bad records, and confidence building measures should be put implemented including addressing legacy issues.
- ◆ Mechanisms of support for indigenous women should be established
- ◆ If WBG is really interested in promoting the development of IPs, then it should not support mining, since IPs do not and have never benefited from mining.

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**Papua New Guinea: Case Study on the Multilateral Investment Guarantee Agency's involvement in the Lihir Gold Mine.**

**Background**

PNG is a culturally and biologically diverse country, with a ~100% indigenous population, and 95-97% of land is customarily owned. It is geologically highly prospective, so mining is considered an integral part of country's economy. It is home to some of the most notoriously controversial mining projects such as Panguna, Porgera, Ok Tedi, and Misima. PNGeans are becoming more aware of the issues and problems surrounding the extractive industries, and have become vocal on benefit distributions and compensation for the negative impacts it has on their lands. The complexity of land tenure in PNG makes compensation a thorny issue, and benefit distribution from the extractive industries is fraught with injustices. The WBG has been deeply involved in policy changes regarding the extractive industries in PNG through various technical assistance loans to the PNG government

**Lihir Gold Mine:**

The WBG's MIGA provided a political risk guarantee of \$50 million to Rio Tinto, the Lihir Gold Mine operating company, in 1997. The US Overseas Private Investment Corporation declined financing this mine on environmental grounds. Lihirians are shareholders in the mine, yet were unaware of WBG monitoring processes which had been ongoing since its inception, and in March 2003, 100% of Lihirians interviewed did not know of the WBG's involvement in the mine.

Unequal wealth distribution, with startling differences in salaries, facilities, amenities, general well-being, and even in prices, is observed on Lihir. The mine is pumping 110 million m<sup>3</sup> of waste into the ocean each year through a pipeline using a submarine tailings disposal system, and dumping 20 million tonnes of rock waste into Luise Harbour every year. The environmental monitoring however is not independent, and is paid for by the company. The environmental consultations have been all but transparent. The rivers have been polluted, the sea is polluted, the most revered sacred site has been destroyed, and the game depended upon by Lihirians has all but disappeared. Relocation has not taken into account the complexity of land tenure in PNG, leaving many individuals frustrated, worse off and in very difficult positions regarding theirs and their children's future. The sudden transition from a subsistence based existence to a cash based one has proven complex, as indeed has coping with the large influx of foreigners. Lihirians are deeply concerned about the future of their culture, and the society their children will inherit. The traditionally matrilineal Lihirian society has been undermined, and the imposition of western sexist politics has greatly inhibited the Lihirian women's voice. This imposition has also skewed the traditional land inheritance process which the incomers treated as patrilineal, leaving many families landless.

**Recommendations:**

- ◆ The WBG should ensure that any review, development or changes in legislation concerning the extractive industries should be fully consultative and participatory
- ◆ The mining department and the WBG should conduct forums and meetings for discussion of regulatory framework modifications with PNGeans
- ◆ Social, environmental and economic concerns should always be considered in the legal framework
- ◆ WBG should fund research into problem projects they have been a party to, and thus fund the independent monitoring of the Lihir mine project
- ◆ No new mines should be permitted until the basic rights of indigenous peoples have been ensured, and the industry has committed to halt submarine and riverine tailings disposal.

## **Russia: World Bank Group Projects and the Indigenous Peoples of the North, Siberia and Far East of Russia**

### **Background:**

- ◆ The cultural survival of IPs in Siberia and the Russian North is extremely fragile due to a difficult environment and governmental process of assimilation: oil development increases the threat to their survival
- ◆ Indigenous Peoples are already a minority within their own territories
- ◆ The Russian budget is entirely dependent on oil and gas, yet law implementation is poor
- ◆ Alongside the European Bank for Reconstruction and Development, the World Bank Group's political and economic influence is considerable in Russia
- ◆ Can the World Bank's involvement improve the lives of indigenous peoples and contribute to sustainable development?

### **Consequences of oil extraction in Siberia and the Russian Far East:**

The environmental destruction caused by past oil and gas operations is immeasurable, and yet oil development is being encouraged once more. As oil is being redeveloped in Siberia, this old infrastructure is being reused, leading to catastrophic spills, such as that in Komi, where 100,000 tons of crude oil was released over 6 months (The IFC's Polar Lights project [see below] was using that pipeline). Most large oilfields are located in the remote northern areas of Russia, where environmental recovery is extremely slow. These are also the areas inhabited by the last reindeer herding tribes and indigenous peoples of Siberia. The culture and values of temporary oil workers collide with the values of indigenous peoples, resulting in severe losses for the indigenous traditional lifestyles and subsistence. An example amongst many is the case of the Evenks: their sacred places were defiled, the spawning grounds of the fish they rely upon was destroyed, their hunting grounds were emptied of game, their hunting structures, winter huts and traps were looted and destroyed. The discovery of oil on their land led to utter desolation and breakdown of social structure

### **The Polar Lights Project of the IFC in the Nenets Autonomous Okrug:**

- ◆ The positive outcomes of having the WBG involved are: improved ecological and technological standards, in comparison to Russian standards which are severely deficient.
- ◆ Negative impacts: lack of IPDP, lack of information; post-project consultation; the company refused to cooperate with the local herdsman communities
- ◆ The company is in conflict with the local administration, and there are allegations of corruption, although the local population are left in the dark.
- ◆ High level jobs depend on high level qualifications. These are available within the companies but not much to local people because of their limited qualifications.

### **Recommendations:**

- ◆ A moratorium on all new OGM projects affecting indigenous territories should be established
- ◆ Recognition of international law, human rights standards and IP rights should be effected
- ◆ Partnerships should be developed with IPs, and involve them at all stages of the project cycle
- ◆ The WBG should encourage national governments to implement national rights and legislation
- ◆ A system of credible monitoring and protection is urgently required
- ◆ Transparency of consultations should be ensured, which in turn guarantees IPs their right to veto extractive projects
- ◆ IPs should be fully involved in WBG development strategies and IP Development Plans
- ◆ The UN decade of Indigenous Peoples theme "Partnership in Action" should be endorsed

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Together this combination argues the need for, greater transparency and tighter regulation of EI industry development and of any Bank involvement in it as part of a package of necessary protections for vulnerable communities and threatened environments. The wide spread scepticism of indigenous peoples faced with promises of reform or reviews of practice is well founded on past negative experience and at least until measures including confidence building measures begin to be seen to deliver improvements in clean up, prevention of abuse and other

raising of standards most indigenous organisations will remain opposed not only to Bank involvement in EI projects on their land but to all EI company incursions.

### **9. A Record of Institutional Failure:**

Where benefits have accrued from the World Bank to affected communities, they have rarely come through the project developers' design but as a result of concessions being won through organised opposition or advocacy work; such as at the Lihir mine in Papua New Guinea. Taken case-by-case, the projects that have caused such immiserations can (all too easily) be dismissed as aberrations – one-off failures from which useful lessons can be learned but which do not cast doubt on the activities and social desirability of the OMG sector as a whole. Taken together, they portray a sector whose aims, practices and policies are fundamentally at odds with the aspirations and rights of Indigenous Peoples.

That the World Bank has, from its inception, been a major backer of the divisiveness, impoverishment and environmental destruction wrought on Indigenous Peoples through the OMG sectors raises major questions about the Bank's internal policies, its commitment to Indigenous Peoples' rights and its claimed ability to influence the outcome of projects in a beneficial way.

As this paper shows, internal Bank safeguard policies have often been routinely ignored or flouted; projects and programmes have been railroaded through, despite clear evidence of their adverse impacts on indigenous peoples, the environment and poverty alleviation. Recommendations for internal reform have been blocked, watered down or sidelined.

Critically this pattern of serial institutional failure is not restricted to the OMG sector: it emerges as consistent theme in reviews of the Bank's performance across the board. Unsurprisingly, the Bank is now viewed with grave distrust by many project-affected communities, particularly indigenous groups.

Re-gaining (or, more accurately, gaining) the trust of such communities is a *sine qua non* of successful project implementation. Indeed, the extent to which the EIR recognises the structural breakdown in trust between the Bank and its intended beneficiaries is likely to prove a major yardstick against which the credibility of its final report will be judged.

Nonetheless, the conviction is growing among many observers that the Bank will never be able to gain such trust, if indeed it once existed.

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### **BOX**

#### **GUIDELINES? WHAT GUIDELINES?**

Existing World Bank policies are not only flawed but rarely implemented in full or in a timely manner. In India for example, none of the environmental and social problems of NTPC operations (at Singrauli) were "fully addressed prior to negotiations". The World Bank's answer to these serious failings was the preparation of various Environmental and Social Action Plans for Singrauli and yet, as the Berne Declaration points out, even these did not consider "the impact on the broader social environment" nor "foresee socio-economic studies on the fate of the earlier project affected people, and resettlement and rehabilitation action plans". In addition by the time these action plans were initiated in 1998, 85% of the new loan was disbursed.

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Likewise, in Bolivia, the construction of two pipelines, the Cuaiba and the Bolivia-Brazil Pipeline, led to post-project implementation of inadequate Indigenous Peoples' Development Plans (IPDPs), which did not even provide the fundamental (and OD 4.20-required) legal land demarcation processes to the "beneficiary" indigenous populations.

Other examples of World Bank projects not complying to the institution's own policies abound. Recent examples can be found in the Inspection Panel report on the Coal India Social and Environmental Mitigation Project. The Chad-Cameroon Oil Pipeline Project is also illustrative: although the project directly impacts the indigenous Bagyéli pygmies, no Indigenous Peoples Development Plan (IDDP) was drawn up as required under the Bank's Indigenous Peoples' policy.

The Chad-Cameroun pipeline and last year's apparent disagreements between the IFC and Bank top echelons over disbursements to the Rosia Montana mine in Romania also demonstrate clear divisions within the Bank over what criteria are critical, the real "meaning" of those criteria, and the degree to which the risks within the project design may or may not be diminished on implementation.

SOURCES:

Bosshard, P., 1999. Energy from Dante's Inferno. Berne Declaration. <http://www.ecb.ch>

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*The Pressure to Lend:*

The World Bank has a raft of policies which, if implemented, could contribute to reducing the social and environmental impacts of its projects. Such policies, however, are routinely flouted (see Box: "Guidelines? What Guidelines?" and see section 7 above)

Why is this the case? Why is Indigenous participation in assessment so unacceptably low? It is at least partly because Indigenous communities mistrust the Bank's procedures, based on years of experience of not having their views taken seriously. The right to free, prior and informed consent by mining-affected peoples is not particular in IFC and MIGA projects, vital information has been denied on grounds of "commercial confidentiality". And, as we shall see, the Bank's recently-diluted policy on Indigenous Peoples appears to violate safeguards supposedly built into its other policies guidelines.

Internal investigations into the consistent failure of World Bank staff to implement operational directives on issues such as resettlement, environment and indigenous peoples have also repeatedly highlighted the "pressure to lend" as a major reason for non-compliance. This pressure is compounded specifically in the case of IFC and MIGA, by the requirement that the Bank's private arms should loan at commercial rates and make a profit where possible (certainly not operate at a loss): this appears to be the IFC's main motive behind this year's financing of KDL in Botswana. In respect of political risk insurance, MIGA attempts to avoid claims at all costs. This led the agency into deriding the full impact of the Omai tailings dam collapse in 1995 and making the reprehensible decision to continue insurance cover, even when the underlying technical causes of the disaster had not been properly addressed, and thousands of local people had been denied full compensation for their losses.

As a 1992 report by the World Bank's Portfolio Management Task Force, led by Willi Wapenhans, makes clear, the Bank's "pervasive preoccupation with new lending" takes

precedence over all other considerations.<sup>301</sup> According to the Task Force, “a number of current practices – with respect to career development, feedback to staff and signals from managers – militate against increased attention to project performance management.”<sup>302</sup> In the subculture which prevails at the Bank, staff appraisals of projects tend to be perceived “as marketing devices for securing loan approval (and achieving personal recognition)”, with the result that “little is done to ascertain the actual flow of benefits or to evaluate the sustainability of projects during their operational phase.”<sup>303</sup> Little or no effort is made to take the borrowing government’s implementation capacity into account when calculating economic rates of return; “poor policy environments”, “institutional constraints”, lack of “sustained local commitment” – these considerations are often simply ignored in the rush to push projects through and keep them going.

The Bank’s institutional priorities and management structures have thus encouraged staff to flout internal policy directives and borrower governments to ignore loan conditions. Unsurprisingly, the “credibility [of loan agreements] as binding documents has suffered”<sup>304</sup> and “evidence of gross non-compliance [with Bank legal covenants] is overwhelming.”<sup>305</sup> When borrowers disregard loan conditions, the typical response of Bank management has been to look the other way or waive the relevant requirement, unless public pressure forces them to do otherwise. As Patrick Coady, an ex-Executive Director of the World Bank, has remarked: “No matter how egregious the situation, no matter how flawed the project, no matter how many policies have been violated, and no matter how clear the remedies prescribed, the Bank will go forward on its own terms.”<sup>306</sup>

Since 1992, the Bank has introduced a number of initiatives intended to address the problems identified by Wapenhans. However, far from remedying the problems, they have in many respects made them worse, not least by streamlining business procedures in order to speed up loan approvals and by introducing new rewards for staff, who move projects through the approval process at a faster pace, rather than for those who comply with policy.<sup>307</sup> Indeed, a succession of internal reports has continued to criticise the culture of loan approval – where staff are rewarded above all for pushing money – as a major cause of project failure and “leakage” (the Bank’s euphemism for graft).<sup>308 309</sup> In at least one instance, the full findings of one critical

<sup>301</sup> World Bank (1992), *Effective Implementation: Key to Development Impact*, Portfolio Management Task Force. World Bank, Washington DC..

<sup>302</sup> World Bank 1992:15.

<sup>303</sup> World Bank 1992: iv and 14.

<sup>304</sup> World Bank 1992: ii.

<sup>305</sup> World Bank 1992: 8.

<sup>306</sup> Coady, P., Statement to World Bank Board Meeting, 23 October 1992.

<sup>307</sup> Rich, B., *The Smile on a Child’s Face: From the Culture of Loan Approval to the Culture of Development Effectiveness? The World Bank Under James Wolfensohn*, Environmental Defense, Washington DC, 1999, pp.6-7. See also: World Bank Memorandum, Human Resources Policy Reform, 6 March 1998 (internal document).

<sup>308</sup> See, for example: World Bank Quality Assurance Group, *Portfolio Investment Program: Reviews of Sector Portfolios and Lending Instruments – A synthesis*, 22 April 1997 (draft internal report), p.20; World bank, Operations Evaluation Department, *Effectiveness of Environmental Assessments and National Environmental Action Plans – A process Study*, Report No.15835, 29 June 1996, p.37; World bank, Operations Evaluation Department, *Poverty Assessment: A progress Review*, Report No. 15881, 7 August 1996; World bank, *The World Bank Procurement Function – Adjusting to Emerging Needs, April 1998*; World bank, *Loan Administration Change Initiative – Implementation Strategy paper*, 29 June 1998; World bank, *Quality at Entry in Calendar Year 1998: A Quality Assurance Group Assessment*, July 1999. Such reports highlight the undue optimism of project appraisals; the cynicism with which poverty assessments are regarded; the continuing weaknesses in assessing government commitment, local capacity and the more general risks involved in project implementation; and the insidious institutional effects of the pressure to lend.

<sup>309</sup> The 1998 Loos Memorandum on Indonesia specifically identifies the pressure to lend as a major factor in corruption: “There is an inherent tension not only between volume/speed of commitments/ disbursements and the

report – a 1997 review of the Bank’s project portfolio by the Quality Assurance Group – were never officially shared with Board members. Significantly, the report concluded:

*The lessons from past experience are well known, yet they are generally ignored in the design of new operations. This synthesis concludes that institutional amnesia is the corollary of institutional optimism.*<sup>310</sup>

The prime beneficiaries of the Bank’s failure to address the problems identified by Wapenhans and others are bank staff (for whom “projects through the door” are steps climbed on the ladder to promotion) and, of course, project developers. Those who lose are the project affected communities and, where corruption is involved, both national governments and the population at large (*see box: The Lesotho Highlands Water Project*).

*‘Clientitis’:*

Like the “pressure to lend”, the Bank’s desire to keep lending to its client governments – “clientitis”, in the words of Bruce Rich, International Program Director at Environmental Defense, a US non-governmental organisation<sup>311</sup> – has also been identified as a major cause of poor loans being approved by the Bank. This is another problem that the Bank’s management and Board has singularly failed to address, exacerbating the problem of corruption and poor project quality. Even when Bank staff have been well aware of corruption in loans, they have frequently ignored it in order to maintain the flow of lending.

The Bank’s relationship with Indonesia during the Suharto era illustrates the point. In a February 1999 study of lending to Indonesia, for example, the Bank’s own Operations Evaluations Department (OED) noted:

*Warning signals were either ignored or played down by senior managers in their effort to maintain the country relationship. Some staff feared the potential negative impact on their opportunities that might result from challenging mainstream regional thinking.*<sup>312</sup>

Significantly, the Bank’s reluctance to fall out with a major borrower led it to downplay major problems which internal reports had revealed in the Indonesian banking system, with the result that the “Bank’s readiness to address the subsequent financial crisis in Indonesia was seriously impaired.”<sup>313</sup> In this instance, what went right for Bank staff and Indonesia’s then kleptocracy went wrong not just for the Indonesian people but for the entire SE Asian region.

The Bank’s Executive Directors are, it would seem, as amenable to *clientitis* as its staff. Internal World Bank documents and external reports by the US Government and others now provide plentiful evidence that the World Bank’s Board, which is responsible for ensuring that loans are spent as intended, has approved loans to countries with a known record of corruption, despite such countries failing to comply with the Bank’s own anti-corruption regulations and despite warnings that the loans were likely to be misspent.

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quality of our work, but also between these and potential leakages.” See: Loos, J., “World Bank Office Memorandum to Mr. Jean-Michel Severino, Vice President, EAP”, 19 October 1998.

<sup>310</sup> World Bank Quality Assurance Group, “Portfolio Investment Program: Reviews of Sector Portfolios and Lending Instruments – A synthesis”, 22 April 1997 (draft internal report), p.15.

<sup>311</sup> Rich, B., *The Smile on a Child’s Face: From the Culture of Loan Approval to the Culture of Development Effectiveness? The World Bank Under James Wolfensohn*, Environmental Defense, Washington D.C., 1999; World Bank, Confidential Internal Document, Summary of RSI Staff Views regarding the problem of ‘Leakage’ from World Bank Projects Budget, Jakarta, August 1997

<sup>312</sup> World Bank Operations Evaluation Department, *Indonesia Country Assistance Note*, 4 February 1999, p.25.

<sup>313</sup> World Bank Operations Evaluation Department, *Indonesia Country Assistance Note*, 4 February 1999, p.26.

**BOX**

**What went Wrong (or rather Right): The Lesotho Highlands Water Project**

The Bank-funded and promoted Lesotho Highlands Water Project, involving the construction of a series of dams and water diversion schemes, illustrates how project developers have benefited from the Bank's failure to address the pressure on staff to get projects up and running - even at the expense of local people.

Leaked correspondence between the World Bank and the Lesotho government suggests that the Bank knew of corruption allegations against Masupha Sole, the former director of the Lesotho Highlands Development Authority, as early as 1994. The Bank's reaction, however, was to berate the Lesotho authorities for having suspended Sole from his post pending an investigation into the project's accounts. Their reason: it would interfere with project construction timetables and could lead to costly overruns.

In a letter to Mr Pekeche, Principal Secretary at the Ministry of Natural Resources, Praful Patel of the Bank's Southern Africa Department, gripes: "While the undertaking of a management audit may be normal practice, the suspending of key management staff in order to conduct such an audit is most unusual. In our view, the absence of key members of senior staff from the project during this critical time could seriously jeopardize the progress of the project."

Instead of picking up the ball and immediately suspending the companies pending a corruption inquiry - the minimum that the Lesotho authorities' audit should have prompted - the Bank effectively turned a blind eye to the corruption charges. Yet again, what went wrong for civil society - the institutional pressure to push ahead with the project regardless of evidence of corruption - went right (in this case, very right) for the companies. Had suspensions been instituted at this stage in the proceedings, many of the companies might not have been awarded contracts for the second phase of the project - constructing the Mohale Dam.

Indeed, it now emerges that, despite previous assertions to the contrary, the Bank - and the South African authorities - knew full well of the corruption charges at the time that Mohale was approved. Nonetheless, the Bank pushed to have Mohale built immediately, rather than in a decade's time when the water may be needed in South Africa, because the contractors were in place and it would be therefore be cheaper than waiting.

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In the Summer of 1997, for example, *Business Week* alleged that at least US \$100 million from a US \$500 million Russian coal sector loan was either misspent or could not even be accounted for.<sup>314</sup> A little over a year later, the *Financial Times* estimated the amount stolen in the coal sector loan to be much higher, as much as US \$ 250 million.<sup>315</sup>

Perhaps worse, the World Bank's programme in the sector has resulted in potentially high-grade coal reserves not being exploited, even while it has been closing down supposedly uneconomic pits. In the Vorkuta region, between 1995 and 2001, half the coal mines were closed down on the Bank's recommendation, because of high transport costs, and over-supply. But, according to Vladimir Tushkovskiy, head of the Vorkuta coal miners' union, one major mine contains high-quality reserves which, in spite of several million dollars' of investment in its infrastructure during the late 1980s and early 1990's, was never exploited. "The World Bank

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<sup>314</sup> Rich, B., op. cit 13.

<sup>315</sup> Ibid.

said ‘you don’t need so much coal’ so we never opened it”, commented Tuskkovsky in mid-2001 “[The Bank] is an enemy of the people” he concluded.<sup>316</sup>

In the Ukraine, too – where the Bank asserted it was making more efficient, environmentally sound processes and working to defined codes – large scale unemployment and social discord has resulted, while the country continues to hold one of the world’s worst records for mine-based fatalities and serious injuries.

In Indonesia, according to a 1997 internal World Bank study known as the Dice memorandum,<sup>317</sup> some 20 to 30 per cent of all development funds, totaling several billion dollars, have been systematically diverted through corruption. These figures accord closely with estimates by other experts, such as former Indonesian Finance Minister Sumitro Djodjohadikusomo and Jeffrey Winters of Northwestern University. Winters alleged in July 1997 that shoddy accounting practices by the World Bank had allowed the misappropriation of as much as US\$ 8 billion dollars of World Bank lending to Indonesia over the past 30 years.<sup>318</sup>

Jeffrey Winters’ most sensational revelations were of corrupt dealings between the Suharto clan and Freeport (later Freeport--Rio Tinto) in promoting the Grasberg mine in West Papua. Although the Bank did not bankroll the mine, MIGA provided crucial political risk insurance from 1991 until the company itself cancelled the cover in September 1996. Interviewed in early 1997, MIGA’s senior counsel, Lorin Weisenberg, admitted that the Bank had been rattled in 1995, when accusations of human rights atrocities by the Indonesian military, and huge environmental degradation (caused by the mine throwing its tailings directly into the Ajkwa river system) began to circulate around the world. “We had a meeting with Freeport in the US” said Weisenberg. “We knew of the company/s bad reputation and were prepared for a battle. Initially we considered Freeport President, Jim-Bob Moffett to be a buffoon. However by the end of our meeting he was running rings round some of our own people”.<sup>319</sup> The fact that OPIC, the US government political risk insurance agency, had cancelled its insurance on human rights and environmental grounds in 1995 (though under pressure from Henry Kissinger, a Freeport director, it later re-instated it), cut no ice. “We were satisfied with the World Bank’s monitoring of the Grasberg mine” declared Weisenberg. “And the WB had given a relatively clean bill of health to the project”.

As with the Russian loans, the Bank continued to pour money into Indonesia during the 1990s, despite the findings of the Dice report and the allegations building against the Grasberg mine operation in particular. In the 15 months after the report was written, the Bank committed and disbursed over US \$1.3 billion more to Indonesia without any effective measures to address the problems identified by Dice. In October 1998, with plans to commit and disburse two billion dollars more over the next nine months, a second Bank mission, headed by Jane Loos, recorded the following:

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<sup>316</sup> Financial Times, May 11 2001

<sup>317</sup> Ibid.

<sup>318</sup> In response to Winter’s charges, the Bank’s Vice-President for East Asia, Jean Michel Severeno, stated: “This [systematic corruption in World bank lending to Indonesia] is demonstrably untrue. We know exactly where our money is going.” Severino also dismissed the Dice memorandum as “one person’s view based on informal interviews.” He also falsely argued that a follow up study by Jane Loos had failed to confirm Dice’s findings – when in fact it had (see main text). See: Rich, B., *The Smile on a Child’s Face: From the Culture of Loan Approval to the Culture of Development Effectiveness? The World Bank Under James Wolfensohn*, Environmental Defense, Washington D.C., 1999.

<sup>319</sup> Moody, R. (1997), Interview with Lori Weisenberg, *Higher Values*, number 11, Minewatch, February 1997, p.12.

*Our mission confirms earlier reports on corruption in Indonesia: that it is pervasive, institutionalised and a significant deterrent to overall growth of the economy and effectiveness of the Bank's assistance . . . Despite apparent compliance with World Bank guidelines and documentation requirements for procurement, disbursement, supervision and audits, there is significant leakage from Bank funds . . . Bank procedures/standards are not being applied uniformly . . . The [World Bank] auditing requirements have been allowed to deteriorate into a superficial exercise; even an agency with overdue audits was not excluded from receiving new loans.<sup>320</sup>*

Bank staff themselves admit that the Bank has for years been reluctant to address corruption risks openly and directly with borrowers but argue that the Bank is now taking the issue seriously.<sup>321</sup> Nonetheless, a full five years after the Bank first adopted "internationally accepted standards of effective management control",<sup>322</sup> and four years after the Bank's President committed the Bank "to fight the cancer of corruption",<sup>323</sup> its own rules continue to be flouted.

*Rubber stamping:*

The failure of the Bank's board to exercise proper oversight over projects is also a constant theme of external reviews of the Bank's performance. Again the beneficiaries are those project developers whose applications would be rejected if the Bank's procedures were properly observed.

As the US General Accounting Office (GAO) reported in a major study of the Bank's fiscal management control, published in April 2000, the Board continues to approve many projects which fail to meet the Bank's minimal financial management requirements.<sup>324</sup>

Of 12 projects in "corruption-prone" countries randomly selected by the GAO, "six . . . did not meet the Bank's minimal financial management requirements at the time that the Board approved the projects".<sup>325</sup> The report continues:

*Our review of 12 randomly selected projects approved by the Bank since November 1998 identified 5 projects in which the borrowers' implementing agencies had little or no experience managing development projects, according to Bank records and staff . . . Furthermore, for 3 of the 12 projects, the Bank determined that the borrowers' implementing agencies had particularly weak capacity for carrying out procurement in accordance with Bank rules . . . For four projects, the implementing agencies were not yet functioning and did not have key staff or operating procedures in place.<sup>326</sup>*

As a result of these and other deficiencies:

*"The Board may not have had sufficient information to assess the borrower's capacity when approving these loans."<sup>327</sup>*

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<sup>320</sup> Quoted in Rich, B., op. cit. 13.

<sup>321</sup> US General Accounting Office, *World Bank: Management Controls Stronger, but Challenges in Fighting Corruption Remain*, GAO/NSIAD-00-73, Washington DC, April 2000, p.21. See also: The World Bank, *Helping Countries Combat Corruption: Progress at the World Bank Since 1997*, Washington DC, June 2000, p.2.

<sup>322</sup> Ibid, p.36

<sup>323</sup> The World Bank, *Helping Countries Combat Corruption: Progress at the World Bank Since 1997*, Washington DC, June 2000, p.1.

<sup>324</sup> US General Accounting Office, op.cit.23.

<sup>325</sup> Ibid, p.15.

<sup>326</sup> Ibid, p.15

<sup>327</sup> Ibid, p.19.

Disturbingly, in six of eight projects where Bank staff “had flagged weak management capacity, corruption, or political interference as a critical risk”, the project appraisal documents “did not describe what specific supervisory actions the Bank planned to take to mitigate the risks.”<sup>328</sup> It is not known whether or not the Board requested such measures when it approved the projects.

The GAO also notes that the Bank’s new anti-corruption procedures only apply to “about 208, or 14 per cent, of the Bank’s 1500 projects” and that “Bank studies indicate that management weaknesses persist in ongoing projects.”<sup>329</sup> Recent procurement audits, for example, “show a lack of understanding of and non-compliance with Bank procurement rules among many (17 of 25) borrowers subject to these audits.”<sup>330</sup>

Although the GAO review notes that the Bank has made “significant progress” in introducing anti-corruption measures, it concludes, “further action will be required before the Bank can provide reasonable assurances that project funds are spent according to the Bank’s guidelines.”<sup>331</sup> Given the huge sums that have been disbursed since the Bank began operating over 50 years ago – some US \$170 billion<sup>332</sup> – this criticism, which is echoed by a succession of internal Bank reports dating back to the early 1990s, is profoundly disturbing.<sup>333</sup>

Meanwhile, the Executive Directors of the Bank – and Bank staff – remain protected from legal proceedings against them for any failure to abide by the Bank’s own rules. Yet again, what has “gone wrong” from the point of view of good governance has clearly “gone right” for those responsible for the identified governance failures.

*Penalising staff integrity:*

World Bank staff are frequently reluctant to raise questions that might slow down a loan, fearing that by doing so, it will adversely affect their career. Internal Bank memoranda and reports have identified this as a major problem in addressing the Bank’s “culture of loan approval” and, indeed, corruption. In its 1999 report on Indonesia, for example, the OED notes that staff who had drawn attention to major problems in the Indonesian banking sector were perceived to have suffered “unjustified penalties to their career prospects.”<sup>334</sup>

One UK consultant similarly recalls the Bank’s reaction to his discovery of evidence suggesting that one of the world’s largest accountancy companies had submitted false information as part of its bid to win a World Bank contract in Kazakhstan. As he recalls:

*When I showed [the evidence] to World Bank’s Task Manager, I was told that I had not shown [the] document to him, because if I did so show it to him, the World Bank would have to stop [the company] bidding for a 3 year minimum.*<sup>335</sup>

Conversely, investigations which reveal management failure on the part of World Bank staff is rarely penalised. In 2002, for example, the Lawyers Environmental Action Team (LEAT)

<sup>328</sup> Ibid, p.20.

<sup>329</sup> Ibid, p.15.

<sup>330</sup> Ibid, p.15.

<sup>331</sup> Ibid, p.5.

<sup>332</sup> Rich, B., op.cit.13, p.17.

<sup>333</sup> In 1993, for example, the Bank’s Financial Reporting and Auditing Task Force reported that “less than 40 per cent of audited financial information is received by its due date, making it inconsequential for project management” and that “Financial statements received by the World bank frequently are not reviewed by Bank staff or are reviewed by staff without the necessary skills to identify significant problems and initiate appropriate action.” See: Rich, B., op.cit.11.

<sup>334</sup> World Bank Operations Evaluation Department, *Indonesia Country Assistance Note* 4 February 1999, p.20.

<sup>335</sup> Tucker, T., Personal Communication, September 2000.

requested the MIGA's Compliance Advisory Ombudsman (CAO) to investigate MIGA's due diligence procedures with respect to the Bulyanhulu mine in Tanzania, prior to approving an investment insurance guarantee for the mine.

The LEAT complaint drew attention to serious flaws in the process and outcome of the social and environmental impact assessments that had been submitted to MIGA by Barrick Gold, the Canadian company seeking the MIGA guarantee. LEAT argued that these studies should have been carried out before artisanal miners were forcibly removed from the site in 1996 (by Sutton Resources, the company Barrick acquired along with the Bulyanhulu project):

*That was not done. Instead, the companies waited until the Bulyanhulu communities were driven off from the area then purported to undertake an EIA. Even then the information based on these studies that Barrick Gold submitted to MIGA was materially inaccurate, erroneous and misleading. And MIGA, without first carrying out a thorough and competent due diligence investigation to establish the veracity of this information and the soundness of its conclusions, approved millions of dollars in political risk guarantees for the Bulyanhulu mine.<sup>336</sup>*

In its response to the LEAT complaint, the CAO acknowledges that a mission carried out by the International Finance Corporation (IFC) had found that the EIA for the Bulyanhulu project failed to meet the World Bank Group's requirements with respect to "issues of resettlement and compensation related to the pipeline, the tailings dam and the mine...." In addition, that EIA "did not address past issues of land clearance."<sup>337</sup> Without providing any details, the CAO states that the IFC team "noted in detail the remedies that would be required to bring the project into compliance with IFC policies and notes the reputational issues in the 1996 alleged incidents. The IFC recommended an addendum to the EIA be prepared detailing what would be required along the themes outlined above."<sup>338</sup>

The CAO also acknowledges that MIGA was made aware of these concerns after Barrick Gold approached it for guarantee. However, and crucially, "beyond this, the CAO has been unable to find any correspondence from MIGA to Barrick Gold or to ascertain from MIGA or Barrick staff that the issues raised in the IFC back-to-office report had been acted on by MIGA."<sup>339</sup> It is also clear from the CAO's Report that MIGA did not carry out any due diligence investigation on these issues. LEAT notes:

*MIGA never carried out a site visit nor did it ever sent any environmental or social specialist to visit the area! By all accounts, it seems, all MIGA did was to be 'comfortable' with Barrick's assurances that all was well at Bulyanhulu.<sup>340</sup>*

For its part, the CAO concluded that MIGA's due diligence efforts had been unsatisfactory: "At issue ... is whether MIGA sought to or felt it should seek independent verification of critical issues surrounding the viability of a Category A project for guarantee. The purpose and intent of environmental and social due diligence in the World Bank Group is to provide that independent

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<sup>336</sup> LEAT, "Re Assessment Summary of the Complaint regarding MIGA's Guarantee of the Bulyanhulu Gold Mine", Letter to Meg Taylor, Office of CAO, 13 November 2002.

<sup>337</sup> CAO, Assessment Report Summary, Complaint regarding MIGA's guarantee of the Bulyanhulu Gold Mine, Tanzania, p. 8.

<sup>338</sup> Ibid., pp. 8-9.

<sup>339</sup> Ibid., p.9.

<sup>340</sup> LEAT, op. cit. 38.

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verification, precisely so that the Group is not left to 'trust' the sponsor.<sup>341</sup> The CAO also rejected the notion that the IFC mission amounted to a due diligence investigation: a back-to-office report, it said, "cannot qualify as 'due diligence' and IFC made clear to MIGA its status."<sup>342</sup>

No action was proposed against the staff that allowed the MIGA guarantee to be issued despite these governance failures. Nor, as LEAT notes, did CAO draw the obvious conclusion: namely, that "the guarantee should never have been approved, bearing in mind that the IFC mission had found the project wanting with regard to the World Bank Group policies."<sup>343</sup>

*Avoiding binding commitments:*

The Bank's reaction to many of the governance failures identified by Wapenhans and others has been to argue that its safeguard policies are too complicated for staff to implement and should therefore be streamlined. Other arguments have been mustered to support "simplifying" the guidelines. Chief amongst these is the claim that the guidelines impose unjustifiably high transaction costs. This view has become commonplace amongst other multilateral banks and bilateral development agencies. As a recent joint statement by such institutions puts it:

*We in the donor community have been concerned with the growing evidence that, over time, the totality and wide variety of donor requirements and processes for preparing, delivering, and monitoring development assistance are generating unproductive transaction costs for, and drawing down the limited capacity of, partner countries.*<sup>344</sup>

As non-governmental organisations have repeatedly pointed out, such arguments ignore the very real financial and development **gains** that result from ensuring projects conform to the highest standards; they also ignore the high costs that result from poorly planned projects or projects that generate public opposition.<sup>345</sup>

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**BOX**

**'PANEL-PROOFING' THE SAFEGUARD POLICIES**

Over the past few years, many of the World Bank's original safeguard policies – designed to minimise the adverse social and environmental impacts of projects – have been compromised, or are not implemented.

The revision programme is intended to make policies less rigid and more amenable to decentralisation, country "ownership" in line with the Bank's new "learning approach" to development. Bank policy makers assert that clearer and more flexible guidelines will raise the standard of policy implementation and so improve development effectiveness. However, it appears that in the name of "clarity" and "flexibility", the Bank's policies are - as Bank staff put it - being made "panel-proof": that is to say, by

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<sup>341</sup> CAO, op. cit. 39, p. 9.

<sup>342</sup> Ibid

<sup>343</sup> LEAT, op. cit. 38.

<sup>344</sup> Rome Declaration on Harmonization, Rome, Italy, February 25, 2003.

<sup>345</sup> As the chief executive of Britain's Export Credits Guarantee Department notes: "Projects that take full account of environmental and social issues in their design and operation are less likely to fail than those that ignore them... Controversy around projects adds to costs; it is in the interests of exporters and credit agencies to address that as a business issue." See: Brown, V, Speech to Euro 2000 Conference, 2000, reported in *Insurance Day*, "Environment protection now a factor in securing export credit guarantees", 10 March 2003.

making the guidelines less precise and binding, staff are protected from criticism should affected communities make a complaint to the Bank's Inspections Panel.

The original aim of clarifying the directives for staff, and reducing "policy overload" – in the words of one staff member "distinguish[ing] between the 'bottom line' of what is mandatory and the 'would it not be nice to have' statement of intentions" - was subverted however. Under the revised safeguards, the old mandatory guidelines have been whittled down and divided into two categories: a set of new Operational Policies (OPs), whose provisions are mandatory; and Bank Procedures (BP) which are non-binding. In the process, the mandatory guidelines have been reduced to a bare minimum. This weakening of Bank project implementation standards has been compounded by weaker language and the outright removal of fundamental aspects of the policies.

In other words, policies are being made so flexible that staff or borrowers can never be accused of having contravened them and therefore never held to account for problems and failures in implementation

There are four basic reasons why the erosion of standards through the weakening of the safeguard policies is of extreme concern to civil society.

- Eroded policies will further undermine the already limited accountability of the World Bank Group.
- Enfeebled policies will limit the Bank's capacity to avoid or mitigate adverse development impacts.
- Diluted safeguards will widen the growing discrepancy between international social and environmental legal precepts and the standards of the World Bank.
- Any weakening of the Bank's safeguard policies will send the wrong signal to other development donors, development agencies and the private sector who may view the content and application of the Bank's operational policies as examples of best practice to be adopted in their own operations.

As we have seen, the proposed revisions to the Bank's Indigenous Peoples' policy have seriously eroded the already weak protection granted by the Bank to indigenous communities. Other World Bank policies directly relevant to indigenous peoples have also been drastically watered down. The new Operational Policies on Involuntary Resettlement and Forestry are illustrative:

- **OP 4.12 on Involuntary Resettlement**

The conversion of this policy was finalised in 2001, much to the dismay of civil society and NGOs. It was completed without the participation of communities affected or likely to be affected, such as indigenous peoples. The new policy permits resettlement of indigenous peoples even if this would have 'significant adverse impacts on their cultural survival', and it contains provisions which permit the curtailment of the traditional resource rights of indigenous peoples in legally recognised national parks and protected areas. Fundamentally, there is no requirement that standards of living or livelihoods are improved by the resettlement programme, and there are no provisions ensuring free prior and informed consent for indigenous peoples. These omissions

weaken the protections afforded affected communities and limit their options to obtain redress through the Inspection Panel.

- **OP 4.36 on Forests**

The revised version of this policy was adopted in October 2002, and has been widely and bitterly criticised, primarily because it lifts the 1991 proscription on World Bank funded logging on old growth forests. Many indigenous peoples eke out a living out in such forests all over the world, and lifting this ban could have severe consequences for their continued sustenance and survival. In addition, OP 4.36 only requires borrowers to secure the tenurial rights of forest peoples in logging projects, but not in conservation, plantation or non-forestry projects affected forests and forest peoples' livelihoods. There are no clear provisions requiring civil society or indigenous peoples participation in national level forest policy interventions and PROFOR activities. The new forests policy thus leaves the provisions for the needs of forest-dependent peoples to the discretion of the borrower, creating huge space for abuses of all kinds, from illegal eviction to forcible changes in traditional management practices. Although the policy explicitly states that the *'Bank does not finance projects that contravene applicable international environmental agreements'*, the Bank refused to include a comparable phrase requiring borrowers to comply with applicable international human rights agreements as well. As it stands, the World Bank's OP 4.26 on Forests is weak and riddled with gaps which will inevitably lead to the further destruction of remaining old-growth forests and the abuse of forest-dwellers' human rights.

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Nonetheless, the Bank has recently undertaken revisions of a number of its safeguard policies. As documented earlier, the revisions – undertaken in the name of improving development effectiveness – have resulted in a serious weakening of the ability of civil society to hold Bank staff accountable for problems and failures in implementation. In the case of the Bank's Operational Policy 4.10 on Indigenous Peoples, the proposed revisions seriously undermine the Bank's social standards. The new version does not require Bank staff and borrowers to take action to safeguard the internationally-recognised rights of indigenous peoples' to own, control and manage their lands, it merely notes that the borrowers are required to "pay particular attention" to these issues. The proposed new guidelines also fail to apply the test of self-identification as the trigger for the policy; they do not recognize the right to free, prior and informed consent; they do not address many issues related to property rights; and they fail to prohibit the involuntary resettlement of indigenous peoples. In addition, the new policy does not apply to full structural adjustment loans, which can have serious negative impacts on indigenous peoples; it lacks a requirement for detailed baseline studies to determine indigenous peoples' priorities and concerns, despite many Bank publications identifying the absence of such studies as a major cause of projects having adverse effects on local communities; it does not contain any provisions for the monitoring, tracking and evaluation of projects by indigenous peoples themselves; and it only requires a social assessment in cases for the Bank's staff unilaterally decide that a project may have adverse impacts.

Other safeguard policies have suffered a similar fate (*see* Box: "Panel-proofing the Guidelines"). By contrast, no steps have been proposed for making the financial guidelines that apply to Bank project more "flexible" (*read*: "less stringent"). The revision process is restricted to the Bank's social, environmental and development policy guidelines, clearly signalling that quality control in these areas is less important than ensuring borrowers pay up.

The losers in this process are indigenous peoples and other project- and programme-affected communities. The winners are Bank staff for whom the new guidelines now provide greater protection from being held to account.

*Favouring vested interests:*

Many of the problems described above reflect deep-seated cultural patterns within the Bank and its partners in government and industry. Put simply, the World Bank and other funding agencies are institutionally predisposed to behaviour that "makes-things-go-WRONG-for-civil-society-and-RIGHT-for-the-corporations-and-governments-that-benefit-from-the-projects-they-finance-or-underwrite".

This is not surprising. The bulk of Bank staff come from a similar political and economic background and are enmeshed in the social networks that link the Bank to government and industry. They drink in the same clubs, participate in the same training courses, share the same circle of friends and seek the same job vacancies. Even if not born to this world, they have come to participate in it and to endorse its values and aspirations. Moreover, the steady stream of Bank staff that passes through the revolving doors between the Bank, governments and companies that seek its assistance, is a clear indication of how the careers of Bank staff are intertwined with those of their "clients" outside of the Bank. The unwillingness of World Bank staff to "rock the boat" ultimately reflects this shared institutional culture.

Indeed, the World Bank has, throughout its history, assiduously sought to cultivate a sympathetic technical and political elite within governments and industry that share its view of "doing development". In 1955, for example, it established its Economic Development Institute (is this the World Bank Institute?), specifically to train a technocratic elite through whom it could work in the South. In the Philippines, when the IMF's efforts to persuade the government to adopt structural adjustment in the late 1970s were blocked by nationalist factions within the Philippines Central Bank, the baton was handed over to the World Bank. As Robin Broad records, by turning to Bank-trained allies in the Ministry of Industry and Finance, the World Bank was able to bypass nationalist factions within the Central Bank and put in place a US\$200 million structural adjustment loan package, "tied not to a specific project but to a set of policy stipulations consolidating an export-led course for the Philippine industrial sector".<sup>346</sup> In the wake of the agreement, free trade zones were established "with generous incentives to transnational corporations to exploit low-cost Filipino labour", tariffs on imports were slashed and domestic small-scale industries (textiles and the like) restructured to cater for the export market."<sup>347</sup>

Such is the common culture that has emerged amongst Bank staff, and their counterparts in the government ministries with which the bank deals, that one staff member has described the Bank as having an "internally cloned system of thinking".<sup>348</sup> In particular, staff tend to approach the problems of poverty and environmental degradation as an essentially managerial problem, rather than as problems that arise from inequitable power relations. Typically, environmental and social problems are primarily ascribed to *insufficient capital* (solution: increase Northern investment in the South); *outdated technology* (solution: open up the South to Northern technologies); a *lack of expertise* (solution: bring in Northern-educated managers and experts); and *faltering economic growth* (solution: push for increased growth).

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<sup>346</sup> Broad, R., *Unequal Alliance 1979-1986: The World Bank, The International Monetary Fund and the Philippines*, Ateneo de Manila University Press, Quezon City, Metro Manila, 1988, p.11.

<sup>347</sup> Ibid.

<sup>348</sup> Cray, C., "The World Bank's Revolving Door: Share Program Exchanges, World Bank and Corporate Employees", *Multinational Monitor*, Vol. 21, No.6, June 2000.

The key questions of whether money can solve the environmental crisis, of *who* benefits from capital and technology transfers, and of *whose* environment is to be managed, by *whom* and on *whose* behalf, are simply sidelined.

Accompanying this “mindset” is a set of assumptions about decision-making that eschew *process* in favour of *engineering consent* or the naked *exercise of power*. The prevailing attitude is encapsulated in the remarks of Jayme Porto Carreiro, a Bank Senior Energy Planner, who was recently seconded to Electricite de France (EDF under the Bank’s “Share” scheme, a programme enabling employee sharing between multinational corporations and the World Bank.:

*I was to drop everything and manage the purchase of London Electricity (LE), a large power distribution company in England. [Facing a need to get approval from the EU's competition commission] my experience as Bank staff proved invaluable. I did what any of my colleagues would have done. I instructed the lawyers to tell the European Commission to change its laws.*

Lack of accountability compounds the anti-democratic tendencies inherent in the “Masters-of-the-Universe” approach of many Bank staff. Neither individual project staff nor the Bank itself are in any real sense accountable to the local communities affected by Bank projects, policies and programmes. Large-scale OMC projects tend to be implemented over decades but, typically, staff in government institutions, private companies, consultancies and banks, may only work on any one project for a few years or even a few months – often only a few weeks or days in the case of consultants on short-term contracts to assess issues such as social impacts. Yet the contents and consequences of their reports and decisions may not show up until months or years later.

This grave deficiency might be ameliorated if the institutions themselves were in some way legally obligated to the affected communities but in fact, grievance procedures are often unwieldy or absent, opportunities for legal redress tortuous, and responsible institutions remote. Enforceable contracts between OMC project developers and affected communities, whether indigenous or not, are the exception not the rule.<sup>349</sup>

This problem is likely to become more, not less, acute as the financing, building and operation of infrastructure projects generally moves to the private sector.<sup>350</sup> Already many private-sector funded projects are eschewing support from the main lending windows of agencies, such as the World Bank, because the environment and development standards required by the Bank are considered too onerous. Instead, companies are turning to publicly-backed Export Credit and Investment Insurance Agencies (ECAs) to guarantee their investments and thus ease the task of raising private sector financing. A major attraction for industry of such ECAs is that, with rare exceptions — the US Export-Import (Ex-Im) Bank and the US Overseas Private Investment Corporation (OPIC) being cases in point — they have no mandatory human rights, environmental and development standards: they also have a secretive institutional culture.<sup>351</sup>

*Drawing conclusions:*

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<sup>349</sup> Rich 1994:148ff

<sup>350</sup> The distinction between private and public-sector dam building is not always easy to make. Many dams are built by private companies on ‘build, operate and transfer’ contracts with government agencies

<sup>351</sup> Hildyard, N., “Snouts in the Trough; Export Credit Agencies, Policy Incoherence and Corporate Welfare”, Corner House Briefing, 1999.

Where does all this lead us? What immediate conclusions might we draw from the growth of institutional norms referred to earlier?

First - and most obvious - that the problems identified in this report are unlikely to be addressed by new regulations *unless* and *until* the well-documented structural and institutional barriers to their rigorous implementation are addressed.

Second - that addressing those institutional and structural barriers will require root-and-branch overhaul of the mission, management and culture of institutions such as the World Bank. Institutions which act so consistently to the detriment of openness, accountability and democratic decision-making processes do not do so because of minor, easily-remedied institutional failures. Their delinquency is far deeper-seated. Combating the pressure to lend, for example, requires more than mere exhortation to take seriously the World Bank's guidelines: it requires radical changes in incentives; severe career penalties for those who flout the rules; and legally-enforceable means of redress for those who suffer the consequences.

Third - such radical change is unlikely to come about through the goodwill of the institutions under scrutiny. Public pressure is essential if change is to be achieved.

But some observers believe that the Bank, whatever changes might be instituted, is structurally incapable of addressing the demands for self-determination of indigenous peoples; and is not willing to do so. Hence it will never honour as it should the basic precept of "fully-informed prior consent" before extractive resource projects are adopted by the Bank. Not only will the required information not be fully imparted (especially in the case of IFC and MIGA funded projects – the Sepon project is a recent example); participation in fundamental local decision-making will never take precedence over financial parameters; and the prerogative of vetoing a project will never be entertained. While it is true that the Bank has, over the past decade, refused to fund a number of mines (such as Rio Tinto/QMM's mineral sands venture in Madagascar) or grant political risk insurance (as it has with regards to Cambior's Gros Rosebel gold project in Suriname), these decisions have usually been taken because of inadequate design criteria. Meanwhile projects involving forced or unjustified resettlement (as with Sierra Rutile in Sierra Leone or KDL in the Kalahari) and the employment of dubious technology (STD at Lihir) have been waved through.

Above all, however, what many critics increasingly believe is that the Bank has, without foundation and adequate research, merely adopted the extractive industries' contention that OGM projects contribute directly to sustainable community development, so long as they can make a profit. Instead of challenging this notion from the outset, the Bank has consistently upheld it. Indeed, it has been the prime agent in reforming state mining codes in favour of foreign private capital, and dismantling many state-owned mining companies, instead of seeking to make them more efficient, democratically accountable and environmentally secure. In the process, many thousands of mineworkers have lost their jobs, manifestly self-serving companies have been allowed to usurp indigenous and national patrimony, and – instead of creating the basis for community sustenance - Bank-supported mines have created social divisions and exacerbated communal conflicts.

#### **10. From 'best practice' to binding standards:**

Over the past thirty years, industry attitudes towards indigenous peoples have changed substantially, both as a result of pressure from indigenous peoples and because of major advances in the recognition of the rights of indigenous peoples at the international and national levels (and see section 5). Indigenous rights groups emphasise that:

- Mining is a privilege not a right
- Extractive Industries negatively impact the environment and therefore limit alternative development options
- Current standards and practices in the EI sector are generally inadequate to protect the environment and fail to minimize negative environmental and social impacts. There is a need to substantially raise standards of protection.
- Some current practices including marine dumping, river dumping and all off site dumping of waste need to be banned.
- Some areas including those with protected area status within ancestral lands should be excluded from all EI development.

Given the profound and disruptive impact of Extractive Industries projects there should be a basic precautionary approach based on a presumption against such development. The onus in each project should therefore be on the proponent companies to justify and argue the need and value of the particular project, in all aspects so that the costs and benefits are reviewed in a critical manner. The current widespread presumption in favour of EI projects provides a framework that has clearly failed to safeguard affected communities and encourages speculative and none viable projects

Successive reviews of the experience of indigenous peoples in many parts of the world suggest that the following standards should be observed as a minimal framework to guard against the negative effects of mining oil and gas projects:

- Government policies and laws should be adopted and applied which recognise indigenous peoples' rights and promote cultural diversity, territorial management and self-governance, including recognition of the rights of indigenous women.
- Clear recognition of indigenous peoples' rights over their lands and territories and their rights to the use and access of the natural resources that they depend on.
- Effective protection of subsistence activities and the environment and other resources necessary to sustain such activities.
- Acceptance of the principle of free, prior and informed consent (including the right of local communities to say 'no' to developments on their customary lands).
- For communities living in voluntary isolation, or where free, prior and informed consent is not given to the satisfaction of indigenous peoples and independent monitors who enjoy the confidence of local communities, then it should be assumed that consent has not been given.
- Recognition of the peoples' own representative institutions.
- Clear and mutually accepted mechanisms for the participation of indigenous peoples in decision-making.
- Acceptance that indigenous peoples are rightsholders and not just 'stakeholders'
- Acceptance of the need to work in a human rights framework

- Timely provision of information in culturally appropriate forms and in locally accepted languages
- Full disclosure of company plans and risks
- Identification of ‘bad actor’ companies and governments and their exclusion from future projects
- Recognition of the right of communities to conduct an independent audit of mines plans and operations, and the provision of resources for such
- Provisions for the costs of indigenous peoples obtaining independent legal counsel and independent technical advice of their choice on social and environmental issues related to proposed mining.<sup>352</sup>
- Detailed, open and participatory environmental and social impact assessments, which should include respect for and use of indigenous knowledge, establishment of sound and agreed base line data and open consultations with all affected groups
- Culturally appropriate mechanisms to ensure the participation of marginalised groups within indigenous societies such as women and children, the elderly and those who are illiterate.
- Inclusiveness should be the guiding principle for negotiations and should include the involvement of groups living downstream and adjacent to proposed mine sites.
- Early and iterative negotiations between developers and affected peoples, providing time and respect for community decision-making processes.
- Negotiations to take place in indigenous peoples’ territories or communities and not in far off locales like capital cities nor in secret.
- Respect for communities’ consensual decision-making processes. Industries and governments agencies should not try to extract decisions as this may divide communities and create dissent.
- Agreements which provide enforceable contracts, mechanisms for the arbitration of disputes, and joint implementation and remedial measures, without demanding the surrender of rights.
- Agreements which include financial mechanisms for dealing with the costs resulting from both foreseen risks and unforeseen developments resulting from mines development
- Establishment of parallel local citizens’ oversight committees to assess progress and activate redress mechanisms when necessary .
- Full protection of key religious and cultural sites and areas vital to subsistence.
- Compensation with land for land
- Joint monitoring and evaluation making full use of indigenous knowledge
- No forced relocation

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<sup>352</sup> Australian NGOs recommend the establishment of independently administered funds to ensure resources are available for effective community participation. Such trusts should include both indigenous and company representatives on the Board of Trustees, but the majority of Trustees should not be local people (Gail Whiteman and Katy Mamen, 2002, *Meaningful Consultation and Participation in the Mining Sector: a review of consultation and participation of indigenous peoples within the international mining sector*. North-South Institute, Ottawa :39).

- Resettlement and impact mitigation plans, which ensure that those affected end up better off than before the project.
- Benefit sharing options including revenue sharing or joint ownership schemes.
- Mechanisms to ensure the transparent and equitable administration of funds for community benefit
- Capacity building of indigenous peoples' institutions
- Mutually agreed, legally binding and enforceable reclamation plans to restore lands and habitats after mine closure, including credible and full financing, to ensure that the mine sites are left safe and stable
- Companies should be required to post adequate bonds to cover restoration and guard against disasters and damage: the 'polluter pays' principle should operate
- Establishment of independent regulatory oversight mechanisms that include local participation and enjoy local confidence to ensure compliance
- Mutually accepted arbitration processes for the resolution of ensuing disputes
- Guarantees not to use private armies or repressive security forces. No physical force, coercion or bribery should be applied.
- Mutually agreed, formal and legally enforceable contracts, binding on all parties and enforceable through the national courts.<sup>353</sup>

Companies vary greatly in the extent to which they have adopted any of these principles as corporate practice. Certainly it is true to say that an overall shift in the industry towards an acceptance of greater community participation is discernible.<sup>354</sup> Some multinational companies have begun to accept that their mining and oil and gas operations should, at least, comply with the provisions of the International Labour Organisation's Convention 169 even in countries which have not ratified the convention. However, as the North-South Institute of Canada notes, after carrying out a very comprehensive review of the consultation and participation procedures within the mining sector:

*To date there is not one company that has enshrined the concept of free, prior and informed consent in its corporate responsibility or Aboriginal policy.*<sup>355</sup>

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<sup>353</sup> Marcus Colchester, Jean La Rose and Kid James, 2002, *Mining and Amerindians in Guyana*. North South Institute, Ottawa and Amerindian Peoples Association, Georgetown; Whiteman and Mamen 2001 op. cit. ; Viviane Weitzner, 2002, *Through Indigenous Eyes: toward appropriate decision-making processes regarding mining on or near Ancestral Lands*. North-South Institute, Ottawa ; MMSD, 2002. ; Joji Cariño pers. comm. 2 April 2003.

<sup>354</sup> FPP, PIPLinks and WRM, 2000, *Undermining the Forests: the need to control transnational mining companies – a Canadian case study*, Forest Peoples Programme, Moreton-in-Marsh; Whiteman and Mamen 2001 op. cit.

<sup>355</sup> Weitzner 2002:55 op. cit..

### **Mining and Indigenous Peoples: emerging standards**

International agencies such as the International Finance Corporation (the private sector arm of the World Bank), Bread for the World (Germany), the International Labour Organisation and Conservation International, have not yet accepted such clear principles. They propose the following for improving the relations between indigenous peoples and the mining, oil and gas industries:

*Establish a Consultation Mechanism from the beginning*

- Clear process for information sharing in appropriate languages
- Early, open disclosure of information
- Effective public consultations and two-way communications
- Recognition of peoples' own representative institutions
- Demonstrable mechanisms which allow peoples views to influence decision-making

*Carry out a Detailed Environmental Impact Assessments:*

- Establish sound baseline data making use of indigenous knowledge
- Identification of risks and elaboration of a mitigation plan
- Identification of remedial measures to restore degraded areas after mines closure

*Carry out a Detailed Social Impact Assessment:*

- Scoping to assess parameters
- Involvement of local 'stakeholders'
- Use of indigenous knowledge
- Pay special attention to livelihood, health and cultural issues

*Institute a Monitoring and Evaluation process:*

- Involve local people in M&E
- Make use of local knowledge and Participatory Rapid Rural Appraisal methods

*Agree on a Community Development Plan*

- Benefit sharing plan
- Establishment of independently managed community trust funds
- Compensation plan
- Appoint Community Liaison Officer

*Recognise the rights of the Indigenous Peoples:*

- Regularise tenure and recognise the rights of customary owners

*Establish Clear Regulatory Frameworks*

- Regularise land ownership and demarcate indigenous territories
- Revise laws and regulations through participatory processes
- Transform voluntary guidelines into required best practice
- Provide mechanisms by which citizens can gain redress through the courts
- Allow affected groups to sue foreign companies in the courts in their home countries
- Promote international regulatory bodies and international courts.<sup>356</sup>

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<sup>356</sup> Russel Lawrence Barsh and Krisma Bastien, Krisma, 1997, *Effective Negotiations by Indigenous Peoples. An Action Guide with Special References to North America*. ILO, Geneva; IFC, 1998, *Doing Better Business through Effective Consultation and Disclosure*. International Finances Corporation, Washington DC; Conrad B.

Studies make clear that reliance on codes of conduct and self-regulation are not enough to secure the rights of indigenous peoples. In the absence of binding regulations and legally enforceable agreements and contracts, the powerful interests of the extractive industries all too easily override local concerns. The history of mining is indeed, to a large extent, a history of breached agreements, bad faith consultations and consequent social and environmental damage.

Socially and environmentally acceptable mining can only be achieved within a strong and adequate framework of law, which secures full respect for human rights including the rights of indigenous peoples, and which is backed up credible sanctions for violations and enforced through independent monitoring. The time for reliance on voluntary standards is passed. Binding national regulations, enforceable international standards and clear contracts between miners and affected peoples are the only way forwards.

## 11. Conclusions and Recommendations:

A preliminary conclusion of the World Bank's own internal review of extractive industries is that:

*Increased investment in the EI [Extractive Industries] sector has the potential to bring important development benefits but it is not a universal good. In fact, the evidence suggests that it is more likely to lead to bad development outcomes when governance is poor. Because of the Bank's focus on poverty, and the links between poverty and poor governance, this means that increased EI investment is likely to lead to bad development outcomes for many if not most of the Bank's clients.*<sup>357</sup>

These conclusions derive from a macro-level analysis of developing countries' economic performance. However, the conclusion is also relevant to local situations, where indigenous peoples are concerned. In these situations, 'poor governance' can be taken to mean lack of respect for indigenous peoples' right to self-determination and self-governance.

Where there is a lack of respect for human rights and in particular the rights of indigenous peoples, where there is an absence of the rule of law and where there is little sensitivity to cultural differences, then large-scale extractive industry projects are very likely to have serious negative impacts on indigenous peoples.

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MacKerron and Douglas G. Cogan, 1993, *Business in the Rainforests: Corporations, Deforestation and Sustainability*. Investor Responsibility Research Center. Washington DC; Amy B. Rosenfield, Debra L. Gordon and Marianne Guerin-McManus, 1997, *Reinventing the Well: approaches to minimizing the environmental and social impact of oil development in the tropics*. Conservation International, Washington DC; Lorraine Ruffing and Judith Kimmerling, 1991, *Socio-cultural impacts of Transnational Oil Corporations in Environmentally Sensitive Areas*. United Nations Centre on Transnational Corporations, New York; Amy Rosenfield Sweeting and Andrea P. Clark, 2000, *Lightening the Lode: a Guide to Responsible Large-Scale Mining*. Conservation International, Washington DC; Manuela Tomei, 1996, *Indigenous Peoples and Oil Development: Reconciling Conflicting Interests*. International Labour Office, Geneva; Manuela Tomei and Lee Swepston, 1996, *Indigenous and Tribal Peoples: a Guide to ILO Convention 169*. International Labour Office, Geneva; Anon. 2000, *Canada and the Indigenous Peoples of the Western Hemisphere: putting principles into action in trade and investment*. Aboriginal Policy Roundtable, Canadian Centre for Foreign Policy Development; Brot fur die Welt, 2000, *Principles for the Conduct of company Operations within the Oil and Gas Industry: a discussion paper*. Stuttgart.

<sup>357</sup> World Bank, 2002, *Evaluation of the World Bank's Activities in the Extractive Industries*. Operations Evaluation Department (draft report) page 20, emphasis in original.

Extractive industry projects are only likely to operate to the benefit of indigenous peoples if the 'best practice' standards set out in the previous section are scrupulously adhered to and if binding mechanisms are available to enforce these standards and hold those who violate them to account.

To date the World Bank has refused to accept these standards in dealing with indigenous peoples.

- ❑ The Bank has refused to make borrower countries' adherence to the international human rights treaties, that the countries themselves have subscribed to, as a condition for funding.
- ❑ The Bank has refused to make recognition of indigenous peoples' land rights a pre-condition for its funding.
- ❑ The Bank has refused to incorporate the principle of free, prior and informed consent into its safeguard policies. It has refused to accept the proposed standards on indigenous peoples put forward by the World Commission on Dams.
- ❑ The Bank has refused to adopt standards to ensure that indigenous peoples should not be involuntarily removed from their lands to make way for development.

Moreover, as successive studies have shown and this review has substantiated further, the Bank routinely fails to adhere to those (lower) standards which it has incorporated into its safeguard policies. These compliance failures result from institutional and incentive structures within the Bank, which give low priority to human rights and community concerns and which, instead, prioritise and reward the interests of big business and rapid capital investment.

Given these realities it is hard to avoid the conclusion that, unless there are dramatic changes in the World Bank's policies and performance, **the World Bank should not support, either directly or indirectly, extractive industries that may affect indigenous peoples.**

*Recommendations:*

Ultimately, responsibility to respect, protect and uphold the rights and interests of indigenous peoples rests with the governments of the countries in which these peoples reside. However, in countries with poor governance and where indigenous rights are not respected, development agencies mandated to alleviate poverty **must** seek to make up the 'democratic deficit' by working to higher standards that make real development in indigenous areas possible. To do otherwise, is to continue to accept that the rights and interests of indigenous peoples should be sacrificed in the name of 'progress'.<sup>358</sup>

**I**f the World Bank is to operate as a responsible development agency, and not just as another bank in competition with other lenders with low social standards, then the World Bank will have to revise its policy on indigenous peoples. Key revisions must include the following:

- ❑ The Bank must require borrowers' and clients' adherence to international human rights standards;
- ❑ Recognition of indigenous peoples' rights to their lands, territories and resources must be made a precondition of Bank funding;

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<sup>358</sup> Shelton Davies, 1977, *Victims of the Miracle*. Cambridge University Press, Cambridge; John Bodley, 1982, *Victims of Progress*. Menlo Park, California.

- ❑ The Bank must proscribe its support for projects that require the resettlement of indigenous peoples without their consent;
- ❑ The Bank should not support any developments that may negatively affect culturally important or sacred sites;
- ❑ Bank support for developments that may affect, directly or indirectly, indigenous peoples' lands, territories and resources should be subject to the free, prior and informed consent of the peoples concerned;
- ❑ New mechanisms of accountability must be developed at project, country and international levels to allow affected peoples redress for their grievances and to secure compensation for losses;
- ❑ These policy and procedural reforms must apply to the whole World Bank Group – IBRD, IDA, GEF, IFC, MIGA and ICSID – and must apply to technical assistance projects, grants, loans, credits, investments, equity arrangements, guarantees and other forms of development support, including sectoral and structural adjustment support and programmatic lending.
- ❑ Indigenous peoples must also be involved in integrated prior 'upstream' planning of development schemes to ensure that proposed developments complement and do not undermine alternative livelihood development strategies.
- ❑ The World Bank should support civil society and indigenous peoples' calls for binding 'Code on Corporate Accountability';
- ❑ The EIR should also promote indigenous demands for a 'good practice' seminar on Extractive Industries under auspices of the Office of the High Commissioner on Human Rights.

However, as authors of this document, we doubt that these reforms, by themselves, are enough, given the poor record of the Bank in complying with its own standards. Even if the Bank does adopt these standards, what are the chances that it will actually adhere to them in the future? Changes will also be required in internal accountability procedures and incentive structures to ensure that Bank staff are rewarded and not penalised for taking time and care to comply with policies. This will require both 'carrots and sticks' - positive rewards for effective performance and tangible penalties for lack of due diligence. The Bank will also have to accept that these tightened procedures and higher standards will imply far higher 'transaction costs', in the preparation of projects and programmes, and for effective implementation and monitoring.

It is only once and if such reforms of standards and procedures have been accepted by the Bank and demonstrably applied that the World Bank Group should consider getting involved in partnering 'dirty industries'. Until then the Extractive Industries sector should be a 'no-go zone' for the Bank.

The central component of this 'focused research' was a workshop held in Oxford on 14<sup>th</sup> -15<sup>th</sup> April 2003. At this workshop the indigenous participants presented a declaration on extractive industries which provides the best possible conclusion to this work.

## **Indigenous Peoples' Declaration on Extractive Industries**

### *Preamble:*

Our futures as indigenous peoples are threatened in many ways by developments in the extractive industries. Our ancestral lands - the tundra, drylands, small islands, forests and mountains - which are also important and critical ecosystems have been invaded by oil, gas, and mining developments which are undermining our very survival. Expansion and intensification of the extractive industries, alongside economic liberalisation, free trade aggression, extra vagant consumption and globalisation are frightening signals of unsustainable greed.

Urgent actions must be taken by all, to stop and reverse the social and ecological injustice arising from the violations of our rights as indigenous peoples.

We, indigenous peoples welcome the initiative of the World Bank to carry out an extractive industries review. We note that the purpose of this review is to assess whether, and under what circumstances, the extractive industries can contribute to poverty alleviation and sustainable development.

We note that 'sustainable development' is founded on three pillars which should be given equal weight if such development is to be equitable namely environmental, economic and human rights. We note that this issue has already been addressed by the Kimberley Declaration of Indigenous Peoples to the World Summit on Sustainable Development and by the Roundtable between the World Bank and Indigenous Peoples held in Washington in October 2002. We also draw attention to the findings of the Workshop on Indigenous Peoples, Human Rights and the Extractive Industries organised by the Office of the High Commissioner for Human Rights in Geneva in December 2001.

We, indigenous peoples, reject the myth of 'sustainable mining': we have not experienced mining as a contribution to 'sustainable development' by any reasonable definition. Our experience shows that exploration and exploitation of minerals, coal, oil, and gas bring us serious social and environmental problems, so widespread and injurious that we cannot describe such development as 'sustainable'. Indeed, rather than contributing to poverty alleviation, we find that the extractive industries are creating poverty and social divisions in our communities, and showing disrespect for our culture and customary laws.

### *Key Concerns:*

Our experience of mining, oil and gas development has been one of:

- Violation of our basic human rights, such as killings, repression and the assassination of our leaders;
- The invasion of our territories and lands and the usurpation of our resources.
- By denying us rights or control over our lands, including subsurface resources our communities and cultures are, literally, undermined.
- Many of our communities have been forced to relocate from their lands and ended up seriously impoverished and disoriented.
- Extractive industries are not transparent, withholding important information relevant to decisions affecting us.

- Consultation with our communities has been minimal and wholly inadequate measures have been taken to inform us of the consequences of these schemes before they have been embarked on.
- Consent has been engineered through bribery, threats, moral corruption and intimidation.
- Mines, oil and gas developments have ruined our basic means of subsistence, torn up our lands, polluted our soils and waters, divided our communities and poisoned the hopes of our future generations. They increase prostitution, gambling, alcoholism, drugs and divorce due to rapid changes in the local economy.
- Indigenous women have in particular suffered the imposition of mining culture and cash based economies.
- Extractive industries are unwilling to implement resource sharing with indigenous peoples on a fair and equal basis.

These problems reflect and compound our situation as indigenous peoples. Our peoples are discriminated against. Those who violate our rights do so with impunity. Corruption and bad governance compound our legal and political marginalization. We find that the extractive industries worsen our situation, create greater divisions between rich and poor and escalate violence and repression in our areas.

*Recommendations:*

In view of this experience and in line with precautionary principles,

- ◆ We call for a moratorium on further mining, oil and gas projects that may affect us until our human rights are secure. Existing concessions should be frozen. There should be no further funding by international financial institutions such as the World Bank, no new extractive industry initiatives by governments, and no new investments by companies until respect for the rights of indigenous peoples is assured.
- ◆ Destructive practices such as riverine tailings disposal, submarine tailings disposal and open pit mining should be banned.
- ◆ Moreover, before new investments and projects are embarked on, we demand - as a show of good faith - that governments, companies and development agencies make good the damages and losses caused by past projects which have despoiled our lands and fragmented our communities. Compensation for damages encompasses not only remuneration for economic losses but also reparations for the social, cultural, environmental and spiritual losses we have endured. Measures should be taken to rehabilitate degraded environments, farmlands, forests and landscapes and to reconstitute our lands and territories taken from us. Promises and commitments made to our communities must be honoured. Appropriate mechanisms must be established to address these outstanding problems with the full participation of the affected peoples and communities.
- ◆ Once and if, these conditions are met, we call for a change in all future mining, oil and gas development. All future extractive industries development must uphold indigenous peoples' rights.
- ◆ Equally, international development agencies must require borrower countries and private sector clients to uphold human rights in line with their international obligations. The international financial institutions and development agencies, such as the World Bank, must themselves observe international law and be bound by it in legally accountable ways.

- ◆ By human rights, we refer to our rights established under international law. We hold our rights to be inherent and indivisible and seek recognition not only of our full social, cultural and economic rights but also our civil and political rights. Respect for all our rights is essential if 'good governance' is to have any meaning for us.
- ◆ In particular we call for recognition of our collective right as peoples, to self-determination, including a secure and full measure of self-governance and control over our territories, organisations and cultural development.
- ◆ We demand respect for our rights to our territories, lands and natural resources and that under no circumstances should we be forcibly removed from our lands. All proposed developments affecting our lands should be subject to our free, prior and informed consent as expressed through our own representative institutions, which should be afforded legal personality. The right to free, prior informed consent should not be construed as a 'veto' on development but includes the right of indigenous peoples to say 'no' to projects that we consider injurious to us as peoples. The right must be made effective through the provision of adequate information and implies a permanent process of negotiation between indigenous peoples and developers. Mechanisms for redress of grievances, arbitration and judicial review are required.
- ◆ Education and capacity building is needed to allow us to be trained and informed so we can participate effectively and make decisions in our own right.
- ◆ Before projects are embarked on, such problems as marginalisation, insecure land rights, and lack of citizenship papers must be addressed. Indigenous Peoples' Development Plans (IPDPs) must be formulated with the affected communities and Indigenous peoples should control mechanisms for the delivery of project benefits.
- ◆ Voluntary standards are not enough: there is a need for mandatory standards and binding mechanisms. Binding negotiated agreements between indigenous peoples, governments, companies and the World Bank are needed which can be invoked in the courts if other means of redress and dispute resolution fail. Formal policies and appeals procedures should be developed to ensure accountability for loan operations, official aid, development programmes and projects. These accountability measures should be formulated with indigenous peoples with a view to securing our rights throughout the strategic planning and project cycles.
- ◆ Independent oversight mechanisms, which are credible and accessible to indigenous peoples, must be established to ensure the compliance by all parties with agreed commitments and obligations.
- ◆ Companies seeking to invest in mining, oil and gas ventures on our lands should also be obliged to take out bonds as guarantees of reparations, in the case of damages to our material and immaterial properties and values, sacred sites and biological diversity.
- ◆ We recognise that many mining, oil and gas investments have their origins in national, regional and international policy agreements, which often facilitate relaxation of laws, fiscal reforms, encouragement of foreign investment and accelerated processes for handing out concessions to extractive industries. International agencies, such as the World Bank, promote such changes through adjustment and programmatic lending, through technical

assistance interventions, country assistance strategies and sectoral reforms. Our experience is that often these policy and legal reforms ignore, override or even violate our constitutional rights and our rights and freedoms set out in national and international laws. Often the impacts of these developments on indigenous peoples are ignored during national planning.

- ◆ We demand our right to equal and effective participation in these planning processes and that they take full account of our rights. Given the country-wide embrace of these national strategies, we demand that the agencies such as the World Bank give equal attention to the application of existing laws and regulations which uphold our rights in policy and country dialogues and financial agreements. Development agencies should give priority to securing our rights and ensuring they are effectively implemented before facilitating access to our lands by private sector corporations such as extractive industries. Mining laws which deny our rights should be revised and replaced.
- ◆ The World Bank must encourage member states to fulfil their obligations under international human rights law and existing national legislation on indigenous peoples' rights. Consistent with the call for "Partnership into Action" by the UN Decade for Indigenous People, we call for equal participation by indigenous peoples in the formulation of general Country Assistance Strategies and particularly in Indigenous Peoples Development Plans.
- ◆ Poverty alleviation must start from indigenous peoples' own definitions and indicators of poverty, and particularly address the exclusion and lack of access to decision-making at all levels. Rather than being merely lack of money and resources, poverty is also defined by power deficits and absence of access to decision-making and management processes. Social and ecological inequalities and injustice breed and perpetuate the impoverishment of indigenous peoples.
- ◆ Independent and participatory environmental, social and cultural assessments must be carried out prior to the start of projects, and our ways of life respected throughout the project cycle, with due recognition and respect for matrilineal systems and women's social position.
- ◆ As indigenous peoples, we do not reject development but we demand that our development be determined ourselves according to our own priorities. Sustainable development for indigenous peoples is secured through the exercise of our human rights, and enjoying the respect and solidarity of all peoples. We are thus empowered to make our contributions and to play our vital role in sustainable development.

#### *A Call for Action and Solidarity*

We call on the international community and regional bodies, governments, the private sector, civil society and all indigenous peoples to join their voices to this Indigenous Peoples Declaration on the Extractive Industries.

We call on the World Bank's Extractive Industries Review to uphold our recommendations and to carry through their implementation in the World Bank Group's policies, programmes, projects and processes.

We also recommend a discussion on this theme at the upcoming meeting of the United Nations Permanent Forum on Indigenous Issues. We call on the Permanent Forum to insist on respect for our human rights by companies, investors, governments and development agencies involved in the extractive industries. The Permanent Forum must promote understanding of the negative

impacts of the extractive industries on the economic, cultural, social and spiritual well-being of indigenous peoples and appropriate safeguard policies. The World Bank, as part of the United Nations family, should report to the Forum on how it proposes to amend its policy on indigenous peoples, in conformity with international law and the recognition of indigenous rights.

We also propose that further discussions on this theme of 'Indigenous Peoples, Human Rights and Extractive Industries' are held at the UN Working Group on Indigenous Populations (UNWGIP) with a view to developing new standards on this matter, in conformity with the Working Group's mandate.

We call for democratic national processes to review strategies and policies for the extractive industries towards a reorientation to secure sustainable development.

We enjoin all indigenous peoples to unite in solidarity to address the global threats posed by the extractive industries.

#### **Endnotes:**

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<sup>1</sup> Campaigns Assistant, Forest Peoples Programme: [emily@fppwrn.gn.apc.org](mailto:emily@fppwrn.gn.apc.org) Main author sections 3 and 6, contributory author section 8.

<sup>2</sup> Director, Forest Peoples Programme: [marcus@fppwrn.gn.apc.org](mailto:marcus@fppwrn.gn.apc.org) Main author sections 1, 2, 4, 10 and 11.

<sup>3</sup> Coordinator, Legal and Human Rights Programme, FPP: [fergus@euronet.nl](mailto:fergus@euronet.nl) Main author sections 5 and 7.

<sup>4</sup> The Cornerhouse: [nick@fifehead.demon.co.uk](mailto:nick@fifehead.demon.co.uk) Main author section 9.

<sup>5</sup> Philippines Indigenous Links: [tongtong@gn.apc.org](mailto:tongtong@gn.apc.org) Main author section 8.

#### **Acknowledgements:**

The authors would like to thank Conrad Feather, Tom Griffiths, John Nelson, Mara Stankovitch, Tony Laviña, Joji Cariño, Vicky Tauli-Corpuz, Roger Moody, Matilda Koma, Augustine Hala, Jacklyne Membup, Rodion Sulyandziga, Vladimir Botcharnikov, Vlad Peskov, Catalino Corpuz, Raymundo Rovillos, Peter Duyapat, Armando Valbuena, Gladys Jimeno, Cecilia Mattos, Mabel Otolora, Didier Amougou, Jeanne Nouah, Joachim Gwodog, Bineet Mundu, Philan Horo, Yuyun Indradi, Pak Pius, Adriana Sri Adhiati, Liz Chidley, Tricia Feeney, Ingrid MacDonald, Gisele Morin-Labatut, Nur Hidayati, Catriona Bass, Sara Asadullah, Dr Emil Salim, Chandra Kirana, Julia Grutzner, Robert Goodland, Saleem Ali, Stuart Kirsch, Kathryn MacPhail, Stan Peabody, Clive Armstrong for their contributions to the workshop and for providing help and advice. This work has been funded by grants from the Extractive Industries Review, the International Development Research Centre of Canada and the Moriah Fund. Additional funding for the research and writing by Forest Peoples Programme staff and for translation and publication of the results has come from the Finnish government, the Charles Stewart Mott Foundation and the Ford Foundation. We are very grateful for all this support. None of these are responsible for the views and information presented in this report.